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ABSTRACT

The book of readings is intended for use as supplementary information for a program of workshops on training surrogate parents (focusing on the concepts, attitudes, and skills necessary for an individual to successfully represent exceptional children in the educational decision making process). Considered in the five sections are the following topics (with sample materials in parentheses): (1) state law (questions and answers about a new set of rights for parents and students); (2) Public Law 94-142, the Education for All Handicapped Children Act (a primer on due process); (3) surrogate parenting (a report on Connecticut's surrogate parent program); (4) exceptional children and exceptional programing (a manual on terminology and classification in mental retardation); and (5) due process procedures (a report on state due process procedures). Bibliographies on due process and materials of interest to parents as well as a list of agencies involved with due process are appended. (PHR)

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# SURROGATE PARENT TRAINING PROGRAM

## BOOK OF READINGS

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1978

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We also appreciate and acknowledge the valuable feedback and suggestions received from the group of potential surrogate parents who took part in the pilot training program.

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# TABLE OF CONTENTS

Page

## PROGRAM OVERVIEW

Introduction .......... 2
Program Components .......... 3
Program Objectives .......... 4

## SECTION I STATE LAW

*Your School Records* .......... 7

*Insert*

State Law for Special Education
State Regulations and Policy Statements for Special Education
State Policy: Confidentiality

## SECTION II PUBLIC LAW 94-142

*Primer on Due Process* .......... 16
Revolutionary Legislation for A Bicentennial Year .......... 23
Public Law 94-142 .......... 37
Regulations 94-142 .......... 63

## SECTION III SURROGATE PARENT

*Primer on Due Process*, Section 4, Parent Surrogate .......... 92
Connecticut's Surrogate Parent Program .......... 100

*Insert*

State Provisions for Surrogate Parent

## SECTION IV EXCEPTIONAL CHILDREN AND EDUCATIONAL PROGRAMMING

Children's Rights, Normalization and Organizational Patterns of Institutions .......... 124
Manual on Terminology and Classification in Mental Retardation. 131
Keeping Exceptional Children in Regular Classes .......... 139
In-School Screening of Children with Emotional Handicaps .......... 144
Continuity and Unity in Special Education .......... 147

Page

Behavioral Characteristics of Children with Special Learning Disabilities........................................... 154
* Background and Definitions of Learning Disabilities............. 157
The Learning Disabilities Specialist: Role and Responsibilities. 164
Reaching the Unreachable Child.............................. 181

SECTION V DUE PROCESS PROCEDURES

Primer on Due Process, Sec. 1 and 2............................ 191
Insert
    State Procedures for Due Process
    State Procedures for Parent Involvement in Due Process

APPENDIX A

Bibliography on Due Process.................................. 223

APPENDIX B

Bibliography for Parents..................................... 229

APPENDIX C

Agencies Involved with Due Process........................... 242

* Removed due to copyright restrictions

# PROGRAM OVERVIEW

7

# INTRODUCTION

The surrogate parent training program focuses on the concepts, skills, and attitudes necessary for an individual to successfully represent exceptional children in the educational decision making process. Specifically, the program addresses the issues of state and federal laws, the nature of exceptionalities, special education programming, responsibilities of a surrogate parent, and due process procedures.

The generic design of the training program allows for the use of local policies and state laws. Each facilitator is free to use the manual in a manner that best meets the needs of the participants. One possible method of implementation is the use of various specialists or consultants with expertise in each section. The objectives and suggested activities are intended to be a guide to the content of the training sessions with some process techniques and suggested activities.

The training program is divided into five sections, comprising approximately 40-50 hours of instruction.

Section 1 State laws identify the main features and provisions of legislation providing for the education of handicapped children.

Section 2 Federal laws focus on mandated federal legislation regarding special education.

Section 3 Surrogate Parent focuses on the responsibilities of a surrogate parent in representing a child in the educational decision making process.

Section 4 Exceptional Children and Programming examines the various categories of exceptionality and educational programming options available within the schools.

Section 5 State Due Process focuses on due process, mediation, hearing, and appeal procedures within the state, and the role of the surrogate parent in this process.

It is hoped that the training program will be of assistance to local and state programs in preparing individuals to be and serve as surrogate parents.

## PROGRAM COMPONENTS

The Surrogate Parent Training Program contains the following components: objectives, activities, and suggested instructional and media materials such as transparencies, filmstrips/cassettes, video tapes, readings and prepared worksheets than can be used by the trainer and participants.

The Book of Readings contains articles to be used as preparatory and supplementary information for each workshop session.

# PROGRAM OBJECTIVES

## Section 1 State Law

1. To define the concept of special education
2. To define the concept of exceptional children
3. To describe the identification and diagnostic process
4. To become aware of required programs and curriculum provisions
5. To define the state regulation for confidentiality of records, evaluation of programs, reimbursement procedures, and parents' rights

## Section 2 Federal Law

1. To provide an overview of PL 94-142 provisions
2. To understand the purpose of the law and the definitions
3. To be aware of the specific rights awarded to parent and child
4. To describe individual protections
5. To have a general understanding of the accountability factors
6. To define the due process provisions
7. To discuss the role of the parent in the due process procedure

## Section 3 Surrogate Parent

1. To define the qualifications of a surrogate parent
2. To delineate the role and responsibilities of a surrogate
3. To define the protections and rights of a surrogate parent
4. To be aware of the selection and appointment procedures of an individual as a surrogate

5. To discuss the essential elements of knowledge and training needed by a surrogate
6. To define clearly the procedure for the nomination of a child for a surrogate and the appointment of a surrogate parent to a child

## Section 4 Exceptional Children and Programming

1. To describe the classifications of special education students
2. To discuss the characteristics of exceptional children
3. To define the role of labels in program provisions for exceptional children within the state
4. To describe various instructional models that attempt to provide educational programming for exceptional children
5. To define the role and relationships of personnel within each model

## Section 5 Due Process

1. To define the concept of due process
2. To define the due process provisions within the state
3. To describe the local planning and placement procedure for each exceptional child
4. To define the mediation process and its provisions for parent participation
5. To define the hearing and appeal procedures provided by the state law and the role of parents within this process
6. To delineate the role of the surrogate parent in the due process provisions within the state

# SECTION I

# STATE LAW

# YOUR
# SCHOOL
# RECORDS

## Questions & Answers
## About
## A New Set of Rights
## For Parents & Students

October 1975

CHILDREN'S DEFENSE FUND
1520 New Hampshire, N.W.
Washington, DC 20036
(202)483-1470

## A NEW FEDERAL LAW

### WHAT DOES THE BUCKLEY AMENDMENT DO FOR ME?

The Buckley Amendment is a short name for a federal law known as The Family Educational Rights and Privacy Act. It became law on November 19, 1974. It gives all parents of students under 18 years of age, and all students*over 18 or attending post secondary schools, the right to see, correct, and control access to student records. Schools are required to establish written procedures to carry out these rights.

### ARE ALL SCHOOLS REQUIRED TO COMPLY WITH THE BUCKLEY AMENDMENT?

Any school which receives federal education funds from the Office of Education (OE) must follow the procedures required by this federal law. Most public schools and universities receive money through at least one OE program. A list of programs funded by the Office of Education can be obtained free of charge from American Education, P.O. Box 9000, Alexandria, Virginia, 22304 (ask for "Guide to OE-Administered Programs: Fiscal Year 1975").

### HOW DO I FIND OUT ABOUT THE SCHOOL RECORD PROCEDURES IN MY SCHOOL?

Under the Buckley Amendment, schools are required to notify you about your rights. This should include a description of the procedures for obtaining access, and for removing false or misleading material. If you have not received this information in the mail, call or write to your school principal or dean and request that he or she send you a copy of the procedures.

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*Note: Students under 18 years of age who attend elementary or secondary level schools must rely upon their parents or state and local laws in order to see, correct, or control access to their own records.

## SEEING THE RECORDS

### WHAT KINDS OF STUDENT RECORDS AM I ALLOWED TO SEE?

The Buckley Amendment covers all "records, files, documents and other materials which contain information directly relating to a student", and which are maintained by an educational agency, such as an elementary school district, or a university. The location of the record does not matter -- discipline folders, health files, and grade reports and other records found in a cumulative folder are all covered. Schools are required to provide you with a list of all the records maintained on students.

### ARE THERE ANY STUDENT RECORDS THAT A SCHOOL CAN REFUSE TO SHOW ME?

Yes. You do not have to be shown:

1) a teacher's or counselor's "personal notes": these are notes that a school official makes for his or her own use and are not to be shown to anyone else, except a substitute;

2) records of school security police, if they are kept separate from the rest of the school's files, if the security agents do not have access to any other school files, and if they are used for law enforcement purposes only within the local area;

3) personnel records of school employees.

Note: School officials cannot refuse to show you a record simply because it was sent to them by someone outside the school system.

CAN STUDENTS SEE THE SAME RECORDS AS PARENTS?

No. While the Buckley Amendment permits you to see your own records if you are over 18, no matter how long ago you graduated or how recently you enrolled, there are some additional records that can be withheld:

1) psychiatric or "treatment" records (but you can let a doctor of your own choice look at them for you);

2) confidential letters of recommendation placed in your college file, prior to January 1, 1975, which have been used only for the purposes for which they were requested; and

3) financial records of your parents.

If you have applied to a school but have not been accepted, you do not a right, under the Buckley Amendment, to see records collected about you during the application process.

MUST THE SCHOOL SHOW THE RECORD TO ME RIGHT AWAY?

No. Under the Buckley Amendment, the school has 45 days to grant your request. Check your school procedures to see if they have established a shorter deadline.

CAN THE SCHOOL DESTROY RECORDS AFTER I HAVE REQUESTED TO SEE THEM?

Such action is a violation of the Buckley Amendment. However, schools may remove or destroy records prior to your request.

MAY I READ THE RECORDS MYSELF?

Yes. You have the right to examine the records yourself. If a school official only agrees to read to you from the records, he or she is violating the law.

WHAT IF I DON'T UNDERSTAND SOMETHING IN THE RECORD?

You have a right to receive an explanation of any item you don't understand. There will probably be a counselor, dean or other school staff person in the room with you while you read the records. If this person cannot answer your questions, ask the principal to find someone who can.

MAY I BRING SOMEONE WITH ME, LIKE MY CHILD OR A FRIEND?

Yes. While the Buckley Amendment does not state specifically that you have this right, it does say that you may authorize others to see the records. The school may ask that you sign a statement indicating that your friend has such permission.

MAY I OBTAIN COPIES OF SCHOOL RECORDS?

Under the Buckley Amendment, you may obtain a copy when:

1) records are transferred to another school, and

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### MAY I OBTAIN COPIES OF SCHOOL RECORDS?

Under the Buckley Amendment, you may obtain a copy when:

1) records are transferred to another school, and

2) information is released to third parties.

In addition, if receiving copies is the only practical way you can obtain access -- you are in California and the records are in New York -- the school will have to make copies for you. Local school regulations will govern requests for copies in other situations, and will also establish the amount that you can be charged for each copy.

Remember: You have the right to see the records and take notes from them even if the school refuses to copy the papers for you.

## CORRECTING THE RECORDS

### IF I THINK INFORMATION IS MISLEADING OR FALSE, HOW CAN I GET IT REMOVED?

First, ask the principal or dean to remove it and explain why. If he or she agrees, then you don't have to go any further. If the school official refuses, request a hearing. Put your request in writing and send it to the principal or the school official designated in your school's regulations on student records.

### WHAT IS A HEARING?

In this case, a hearing should be a meeting between you and school officials which is presided over by an impartial individual or committee known as a hearing officer. The purpose is to let each side present evidence about the school record in dispute, and to let the hearing officer decide who is right. Each school must establish its own procedures for conducting hearings. These rules will determine who is permitted to act as a hearing officer and how long it will be until you receive a decision. The procedures must comply with regulations issued by the U.S. Department of Health, Education and Welfare. (See p. for the Department's address).

### MUST THE SCHOOL DISTRICT HOLD A HEARING AS SOON AS I REQUEST ONE?

This will be determined by your school's procedure. The federal regulations only require that a hearing be scheduled within a "reasonable" period of time. If you think school officials are delaying action without good cause, contact the Children's Defense Fund, or one of the organizations listed towards the back of this pamphlet.

### MAY I BRING ANYONE TO THE HEARING?

You have the right to a fair opportunity to present your arguments. This means that you may bring someone to either support your position with evidence, or to present your evidence for you, such as a lawyer or a lay advocate.

### WHAT CAN I DO IF THE SCHOOL DISTRICT FINALLY DECIDES THAT THE MATERIAL SHOULD STAY IN THE FILE?

You may insert into the record a written statement of your objections to the material, indicating why you think it is false, misleading, or inappropriate. (See questions on pages - for other actions you can take).

## CONTROLLING ACCESS TO THE RECORDS

### WHO ELSE CAN SEE MY CHILD'S OR MY OWN RECORDS WITHOUT MY CONSENT?

1) school officials in the same district with a "legitimate educational interest";

2) school officials in the school district to which your child intends to transfer (but only after you have had a chance to request a copy of the records and to challenge their contents);

3) various state and national education agencies, when enforcing federal laws;

4) anyone to whom the school must report information as required by state statute;

5) accreditation and research organizations helping the school;

6) student financial aid officials; and

7) those with court orders.

MAY POLICE, PROBATION OFFICERS OR EMPLOYERS SEE STUDENT RECORDS WITHOUT MY CONSENT?

NO. Under federal law, police, probation officers and employers cannot see or receive information from student records without obtaining your consent. If, however, your state has a statute which was in effect before November 19, 1974, which requires that schools give these individuals such data, then your school has the discretion to do so.

DOES THE BUCKLEY AMENDMENT COVER "STUDENT DIRECTORY INFORMATION"?

Yes. The Buckley Amendment defines student directory information as a "student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous school attended by the student." This information is usually given to newspapers when they print stories on a school's athletics or honor students, or is used in school publications or given to parent/teacher committees. Each year the school must send you a list of what "directory information" it will make available to the public. If you do not want this information distributed, you must tell the school to take your child off its listing of directory information.

MAY THE SCHOOL ASK ME TO SIGN A BLANKET CONSENT FORM AT THE BEGINNING OF THE YEAR SO THAT THEY DO NOT HAVE TO CONTACT ME EACH TIME THEY WANT ME TO CONSENT TO RELEASE OF INFORMATION?

NO. The school must contact you each time that someone requests to see any records.

WHAT MUST THE SCHOOL TELL ME WHEN THEY ASK MY CONSENT TO RELEASE OF RECORDS?

They must tell you what records have been requested, why the request has been made, and who will receive the records.

CAN I SEE A LIST OF EVERYONE WHO HAS ASKED FOR AND RECEIVED INFORMATION ON MY CHILD DURING THE YEAR?

Yes. The school is required to keep with your child's records a list of everyone who requests and receives information about your child. You have a right to see it. The list may not include school employees who have seen the records.

## ENFORCING YOUR RIGHTS

WHAT CAN I DO IF THE SCHOOL REFUSES TO LET ME SEE OR CORRECT MY CHILD'S RECORDS, OR RELEASES INFORMATION WITHOUT MY CONSENT?

Immediately send a written complaint to Family Educational Rights and Privacy (FERPA), U.S. Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, DC 20201. They are responsible for enforcing the Buckley Amendment. Also send a copy of your letter to or personally contact one of the parent or student advocacy groups listed in the back of this pamphlet.

WHAT HAPPENS WHEN I FILE A COMPLAINT WITH H.E.W.?

The agency will investigate your complaint. This will include notifying the school and asking them to respond. You may also be contacted for further information. If the agency decides that the school is in violation, it will order the school to correct the violation within a certain period of time. In cases where the school refuses, H.E.W. can take action to stop all federal education funding to the school.

WHAT SHOULD I TELL H.E.W. IN MY COMPLAINT LETTER?

If you are a parent, tell them your child's name, and the name and address of the school. If you are a student, state whether you are attending or have graduated or are no longer enrolled. (Remember: rejected applicants are not considered students.) Then explain what violation has occurred. Don't just say that your rights have been violated -- use dates and names, and be as specific as you can: "I was shown a file on September 1, 1975, but Mr. Scott, the school guidance counselor, refused to let me see any discipline records. When I asked the principal, Ms. Jones, she also refused." If the school gave you a reason for denying your request, include this in your letter. Be sure to enclose copies of any letters you have written or received regarding the dispute. Providing your home and work phone numbers can speed up the investigation.

CAN I ALSO GO TO COURT TO ENFORCE MY RIGHTS?

The Buckley Amendment does not specifically answer this question. Judges have held, however, that when Congress places conditions on federal funds, citizens affected by the legislation can go to court to enforce these conditions. Since the Buckley Amendment requirements apply to schools which receive federal education funds, you should be able to use the court system to enforce your rights. In some cases, courts have already begun to rule in support of such actions.

CAN I BE REQUIRED TO WAIVE MY RIGHTS UNDER THE BUCKLEY AMENDMENT IN ORDER TO RECEIVE CERTAIN BENEFITS OR SERVICES FROM MY SCHOOL?

NO. Since schools are prohibited from "effectively" preventing parents and students from exercising their rights under the Buckley Amendment, you cannot be required to waive your rights before receiving school services. Students applying to post-secondary school can choose to waive their rights to see confidential letters of recommendation, but they must be told the names of those writing recommendations and be assured that the statements will not be used for any other purposes.

****

If you need legal assistance or have any questions about your rights under the Buckley Amendment, contact Linda Lipton at the Children's Defense Fund (CDF) or your nearby Legal Services or Legal Aid office; one of the groups listed below may also be able to provide assistance to you:

Youth Law Center, 693 Mission Street, San Francisco, California 94105

Education Law Center, Suite 800, 605 Broad Street, Newark, New Jersey 07102

National Juvenile Law Center, St. Louis University, 3642 Lindell Boulevard, St. Louis, Missouri 63108

Juvenile Rights Project, ACLU, 22 E. 40th Street, New York, New York 10016.

Southern Regional Council, 52 Fairlie Street, Atlanta, Georgia 30303

Massachusetts Advocacy Center, 2 Park Square, Boston, Massachusetts 02116

National Public Interest Research Group (post-secondary students), 1832 M Street, NW, Washington, DC 20036.

Additional publications on student recordkeeping issues can be obtained by writing to CDF or to the National Committee for Citizens in Education, Suite 400, Wilde Lake Village Green, Columbia, Maryland 21043. The National Committee may also be able to put you in touch with other parents or students concerned with school records in your area (toll free number, 800-NETWORK).

## ITEMS TO NOTE DOWN

### Inspection of Student Records

- Date request made to see records
- Date response received from school
- Date of appointment with school official
- Types of records reviewed
- Records which were not disclosed (disciplinary reports, psychiatric reports, etc.)
- Misleading or inaccurate statements discovered
- Whether copies were provided upon request
- Whether explanations were provided upon request
- Names of all school officials who handled your request

### Correction of Student Records

- Date request was made to correct or delate information in records
- Date request was granted or denied (If denied, date hearing was requested, date hearing was scheduled, name(s) and title(s) of hearing officer(s), date decision was issued)

- Outcome of hearing (records deleted or corrected, statement submitted by parent or student).

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# SECTION II

# FEDERAL LAW

# PUBLIC LAW 94-142

# A Primer on Due Process:
# Education Decisions for Handicapped Children

Alan Abeson
Nancy Bolick
Jayne Hass

Extensive litigation and legislation have resulted in mandates that state and local education agencies guarantee due process protection to handicapped children in all matters pertaining to their identification, evaluation and educational placement. This article presents excerpts from a new CEC publication which contains an approach to meeting those requirements. The background of due process, sequential procedures required, structure and operation of hearings, the surrogate parent and sample forms are all included in the full publication.

ALAN ABESON is Assistant Director of State and Local Governmental Relations, the Council for Exceptional Children, Reston, Virginia; NANCY BOLICK is Information Associate, and JAYNE HASS is Research Associate, Special Education Administrative Policy Manuals Project, The Council for Exceptional Children, Reston, Virginia.
The work performed herein was done pursuant to a grant from the Bureau of Education for the Handicapped, US Office of Education, Department of Health, Education and Welfare. The opinions expressed herein, however, do not necessarily reflect the position or policy of the US Office of Education, and no official endorsement by the US Office of Education should be inferred.

> "Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function partly...because it was thought children had few rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not to enforce rights, on the assumption that the former could be done without the latter." (Rodham, 1973, p. 506)

## Exclusion and the Right to an Education

With the conflict between safeguarding interests and assuring individual rights as a backdrop, the rights of children in many areas of American life are being examined and clarified, often through judicial intervention. Nowhere is this examination more intense than in public education. In this decade, questions of "rights" for public school students have been raised in relation to freedom of expression, personal rights such as hair length and dress regulations, marriage and pregnancy, police intervention, corporal punishment, discipline, and confidentiality of records. While all of these have an impact on handicapped children, none is more pervasive than the right to due process which governs decisions regarding identification, evaluation, and educational placement. Much litigation has been concerned with handicapped children seeking affirmation of their right to an education and the protection of due process of law. This wave of litigation is evidence of the way in which public schools in the past often ignored appropriate legal processes in denying these children their rights. The public schools often based such action upon law which was interpreted to give them the right to deny the opportunity of a public education to some children, either on a short term or permanent basis.

Today, it is a matter of public policy that the purpose of the public school is to provide every child with the opportunity for a free, public, and appropriate education. This policy makes it clear that to solve the problems a child is having in school by excluding him is not to solve the problems of the child, but of the school. It is unreasonable for the public schools to expel a child because of a behavioral problem (more popularly known as a discipline problem), an inability to learn, or any handicapping condition. Regardless of the types of exclusion that have been used and regardless of where they have occurred, the common denominator is that such practices have usually occurred with little or no regard for due process of law.

## Placement in the Least Restrictive Alternative Educational Setting

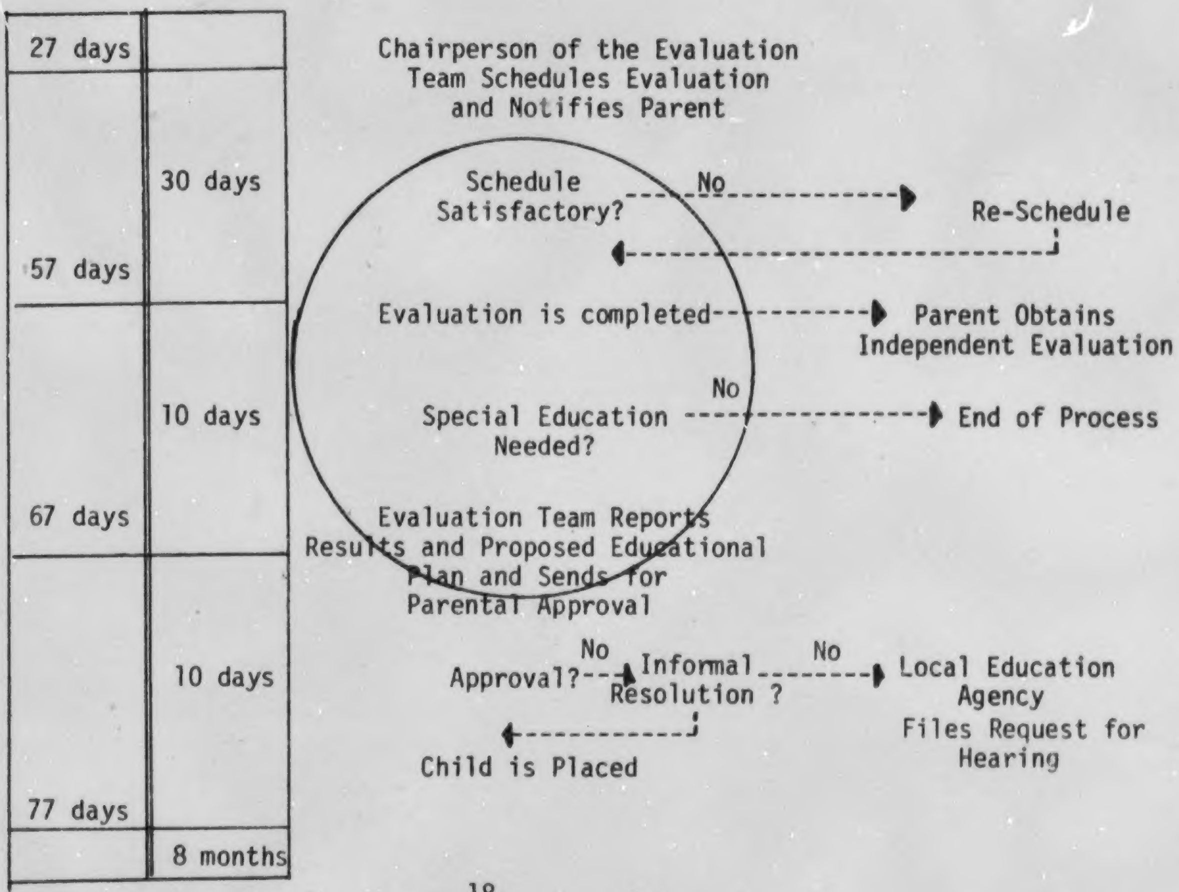
Beyond the situation with excluded children is the requirement that handicapped children be placed for educational purposes in the least restrictive alternative setting. Public Law 93-380, the Education Amendment of 1974, focused specifically on this programing thrust by requiring that a state, in order to retain its eligibility to receive federal funds for the education of the handicapped, must develop a plan to be approved by the US Commissioner of Education, that will contain:

> (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Public Law 93-380, Title VIB, Sec. 612(d)(13B))

The relationship between due process and placement in the least restrictive alternative educational setting is extremely close. Due process establishes the procedures that require the schools to consider all program alternatives and to select that setting which is least restrictive. The basis of this entire concept is the existence of a variety of options or program settings that can be used to provide education to handicapped children depending on their individual needs.

Public Law 93-380 mandates the closeness by also requiring the states in their plans to:

> (13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A)(i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child,(ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child,(iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal. (Public Law 93-380, Title VIB, Sec.612(d)(13A))


27 days
30 days
57 days
10 days
67 days
10 days
77 days
8 months
Chairperson of the Evaluation Team Schedules Evaluation and Notifies Parent
Schedule Satisfactory?
No
Re-Schedule
Evaluation is completed
Parent Obtains Independent Evaluation
No
Special Education Needed?
End of Process
Evaluation Team Reports Results and Proposed Educational Plan and Sends for Parental Approval
No
Approval?
Informal Resolution ?
No
Local Education Agency Files Request for Hearing
Child is Placed

## Due Process, Procedures, and Sequence

Providing a child with an appropriate education is of equal interest and importance to the child, the family, and the schools. To insure that education, it is imperative that, when initial educational evaluation and placement decisions or changes in existing placement are being considered, due process protections must be provided to the child, the family, and the schools. All of these parties will benefit from adherence to well developed educational practices and the elements of due process. When appropriate decisions about a child's education are made in a forthright manner, these parties will be in harmony and the challenges inherent in due process need not be involved. Under other less positive circumstances, however, conflict will emerge and require resolution. Hearings conducted by impartial officers serving as designees of the chief state school officer will be convened, not to place blame or determine right or wrong, but to achieve resolution of the conflict and define an appropriate education program for the child. While the procedures presented may appear complex and perhaps circuitous, it must be emphasized that none of the alternative routes to challenge need be used if all parties agree on the educational needs of the child and the appropriateness of the program proposed by the schools.

A review of judicial orders, existing state and federal legislation, and the work of legal analysts suggests that the following procedures must be provided in order to meet minimum due process standards in identification, evaluation, and educational placement of handicapped children:

1. Written notification before evaluation. In addition, parents always have the right to an interpreter/translator if their primary language is not English.
2. Written notification before change in educational placement.
3. Periodic review of educational placement.
4. Opportunity for an impartial hearing including the right to:
    - Receive timely and specific notice of such hearing.
    - Review all records.
    - Obtain an independent evaluation.
    - Be represented by counsel.
    - Cross examine.
    - Bring witnesses.
    - Present evidence.
    - Receive a complete and accurate record of proceedings.
    - Appeal the decision.
5. Assignment of a surrogate parent for children when:
    - The child's parent or guardian is not known.
    - The child's parents are unavailable.
    - The child is a ward of the state.

Typically, these procedures should be initiated when there is reason to believe that a preschool or school age child is in need of special education services and the child becomes a candidate for individual evaluation procedures including informal assessment or observation and formal testing. Then written permission must be obtained by the local education agency from the parents before the process can begin. This shall also apply when periodic reevaluation is planned.

Prior to the performance of an evaluation the parent shall be provided with both written and oral notices of intent to conduct an evaluation. The written notice shall be in the primary language of the home and in English and will be delivered to the parent during a conference or mailed by certified mail. Oral interpretation shall always be given in the primary language of the home. If the primary language of the home is other than English and a member of the household requests that English also be used, then a second oral interpretation shall be given in English. When necessary, arrangements shall be made to effectuate communication with hearing and visually handicapped parents.

The proposed procedures include a provision that no later than 8 calendar months after a child's educational status has been changed and during each calendar year thereafter, so long as the child continues to receive special services, the local education agency should conduct a review of the child's program to evaluate its effectiveness in meeting the educational needs of the child. At least 5 days prior to each review, the parent should be notified in writing, in the primary language of the home and in English, and orally in the primary language of the home, that the review is scheduled. The notice should also indicate the following information:

1. The date, time, and place of the review.
2. An invitation to the parents to participate in the review.
3. A description of the procedures to be used in the review.
4. A statement that the parents will receive the findings and recommendations of the review team within 10 days after completion of the review.
5. A reiteration of the procedures and rights first encountered at the initial evaluation.

## Hearing Procedures and Officers

Public policymakers, whether legislators or judges at both the state and federal level, have made clear that decisions about identifying, evaluating, and placing exceptional children in education programs must be governed by due process safeguards. Implicit in that requirement is that whenever a decision is contested to the point that a hearing is to be convened, the hearing must be conducted in an impartial manner by an impartial hearing officer or a neutral review panel.

Specifying criteria which can be used for the selection of effective hearing officers in all settings is an impossible task. There are, however, a few general rules which can be made. Individuals selected should:

1. Not be involved in the decisions already made about a child regarding identification, evaluation, placement, or review.
2. Possess special knowledge, acquired through training and/or experience, about the nature and needs of exceptional children. An awareness and understanding of the types and quality of programs that are available at any time for exceptional children is essential.

3. Be sufficiently open minded so that they will not be predisposed toward any decisions that they must make or review. However, they must also be capable of making decisions.

4. Possess the ability to objectively, sensitively, and directly solicit and evaluate both oral and written information that needs to be considered in relation to decision making.
5. Have sufficient strength to effectively structure and operate hearings in conformity with standard requirements and limits and to encourage the participation of the principal parties and their representatives.
6. Be sufficiently free of other obligations to provide sufficient priority to their hearing officer responsibilities. They must be able to meet the required timelines for conducting hearings and reporting written decisions.
7. Be aware that the role of the hearing officer is unique and relatively new, requiring constant evaluation of the processes, their own behavior, and the behavior of all the principals involved for purposes of continuously trying to improve the effectiveness of the hearing process.

## The Parent Surrogate

The specific due process procedures of Public Law 93-380 secure a child's right, through representation by his parents or guardian, to the opportunity for full participation in the total educational identification, evaluation, and placement process. The assumption is that the parents or guardians will be available and willing to participate in this decision making process, fully accepting the responsibility of representing the child's best interests.

There are, however, children who lack this kind of personal representation, protective legal doctrines notwithstanding. They are the children whose parents or guardians are unknown or unavailable, or children who are wards of the state. The rights of these children are not safeguarded if they are without an advocate to act for them. Recognizing this, Public Law 93-380 provides for the appointment of a "parent surrogate," i.e., an individual appointed to safeguard a child's rights in the specific instance of educational decision making-identification, evaluating and placement.

The task of locating individuals to act as surrogates could be done by a state level standing board or advisory committee established to advise and work with the state as it delivers services to handicapped children. Members of this type of board are concerned with quality education and generally include parents, teachers, professionals involved with the education and treatment of children with special needs, and other community members who are interested in the education of handicapped children. Such a group has channels of communication open to local professional organizations concerned with the handicapped (Association for Retarded Citizens for example) and to individuals such as parents of handicapped and nonhandicapped children, pediatricians, or attorneys sensitive to the needs of children. These are individuals who may be considered for selection as surrogates. It is recommended that any pool of surrogates not include state or local education employees. Because of their employment, they may be unable to act as impartially as desired. A surrogate must have the child's best interests constantly in mind, and if he is employed by a local or state system concerned with handicapped children, he is placed in the position of serving two masters.

Once the state board has identified persons it feels would be effective surrogates, it will send their names to the state education agency, which has the responsibility of assigning a surrogate to a specific child. Individuals should be located in all parts of the state so that every child will have easy access to his/her surrogate. The state agency should develop a training program, devise a system of compensation, determine the rules and regulations governing the employment of a surrogate, and develop plans to disseminate information about the program.

## Implications for Public Education Agencies

It is important for public educators to understand that implementing dur process may produce many positive benefits. The availability of due process procedures, particularly hearings, provides the parent with the opportunity for holding the professional accountable, a desire of many professionals. In this context, the procedures of due process that require parent-school communication create the opportunity for school personnel to be open and honest with the ultimate consumers of their services. These requirements will also enable educators to adopt an additional procedure that has long been a goal-- the provision of individually designed education programs. Individual plans provide the basis for intelligent assessment of a child's progress in relation to the objectives initially established. The concept of periodic review, also a requirement of total due process protection, conforms with good educational programing as well.

Finally, educators must be aware that adherence to due process procedures will in no way reduce their professional responsibility or authority. It can provide them with the leverage to do that which must be their goal-- to act openly and in the best interests of the children they serve.

## Reference

Rodham, H. Children under the law. Harvard Education Review, 1973, 43, 487-514

# REVOLUTIONARY LEGISLATION
# FOR A
# BICENTENNIAL YEAR

Prepared for

Education and Training of the Mentally Retarded

The Journal of the Division on Mental Retardation

The Council for Exceptional Children

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# REVOLUTIONARY LEGISLATION FOR A BICENTENNIAL YEAR

## A Critical Analysis of Public Law 94-142:
## The Education of All Handicapped Children Act

> It is the purpose of this Act to assure that all handicapped children have available to them....a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist the states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. (Section 601(c) of the Act).

On November 29, 1975, President Ford signed into law The Education of All Handicapped Children Act. This landmark education legislation mandates an appreciably accelerated federal commitment in order to insure that all handicapped children receive full and appropriate educational programs and services.

The legislation amends and considerably improves Part B of the Education for the Handicapped Act, Public Law 93-380 (commonly termed the Mathias Amendment after its originator), signed August 21, 1974, which created the first entitlement for handicapped persons based upon factors of the number of all children aged three to twenty-one years of age in each state.

With the approval of P.L. 94-142, special education service delivery in the United States will potentially undergo the most dramatic and comprehensive changes witnessed heretofore.

### Chronology

November 18, 1975 - The Education of All Handicapped Children Act (EAHCA) was passed by the House of Representatives by a margin of 404 yeas to 7 nays.

November 19, 1975 - the EAHCA received overwhelming Senate support, 87 yeas to 7 nays.

The final version of the conference report was accepted with minor debate, modifications being made so that the final product, in part, contained some language not included in either S.6 or H.R. 7217.

November 29, 1975 - The EAHCA after the house-senate conference was enacted by the Senate and House of Representatives, to be subsequently identified as Public Law 94-142.

## Rationale

The genesis and final approval of the Act were, in part, in response to the following Congressional findings:

1. There are more than eight million handicapped persons in the United States, approximately one-half of whom are not being provided appropriate educational services
2. Those handicapped persons whose special education needs are not being addressed are being denied full equality of opportunity.
3. Approximately one million of the handicapped children in the United States are excluded entirely from the public school system
4. Many handicapped persons throughout the United States are participating (unsuccessfully) in general education programs, while their handicaps remain undetected
5. Adequate special education services are not being provided within the public school system, forcing families to find services outside their local school system, often at great distance from their residence and at their own expense
6. Advancements in teacher training programs, as well as diagnostic and instructional procedures and methods,have progressed to the point that given appropriate funding, state and local educational agencies can and will provide efficacious special education programs and services
7. Current fiscal appropriations preclude state and local educational agencies from meeting the needs of handicapped persons
8. It is in the national interests considered that the Federal Government assist state and local educational agencies in providing comprehensive and qualitative programs and services for the handicapped in order to assure equal protection of the law.

At this juncture, major issues relative to the implementation of the Act are being discussed and have yet to receive consensus. However, it is anticipated that clarification will be provided subsequent to the publication of specific rules and regulations necessary to carry out the new programs to be administered under the law. Terrell H. Bell, Commissioner of Education, is required by language included in the Act to submit articulated regulations for publication in the Federal Register, not later than 120 days after the date of enactment. Therefore, during the early part of this Bicentennial year, it can be expected that substantive delineation will be forthcoming.

For the purpose of this paper, perspective will be limited to a macroscopic vantage of the salient features of the legislation. Therefore, the analysis which follows is intended to serve a dichotomous function: to provide an overview of the major components, concurrent with generating the understanding that P.L. 94-142 is a complex and multidimensional Act which cannot be adequately addressed in a single analysis.

## Public Law 94-142

### PART B ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

| Component | Title |
|---|---|
| Section 602 | DEFINITIONS |
| Section 611 | ENTITLEMENTS AND ALLOCATIONS |
| Section 612 | ELIGIBILITY |
| Section 613 | STATE PLANS |
| Section 614 | APPLICATION |
| Section 615 | PROCEDURAL SAFEGUARDS |
| Section 616 | WITHOLDING AND JUDICIAL REVIEW |
| Section 617 | ADMINISTRATION |
| Section 618 | EVALUATION |
| Section 619 | INCENTIVE GRANTS |
| Section 620 | PAYMENT |
| Sections 606, 607, 653 | AMENDMENTS |

### SECTION 602 - "DEFINITIONS"

The most substantive amendment in this component is the inclusion of the categorical area "children with specific learning disabilities." As of this printing, further explication of the term is being prepared by the Commission of Education. It is anticipated that three integral outcomes will ensue as a result of the Commissioner's efforts: a more precise operational definition; a prescription for comprehensive diagnostic criteria; monitoring, as well as delineation of monitoring procedures.

### SECTION 611 - "ENTITLEMENTS AND ALLOCATIONS"

#### Beneficiaries

Stipulated is that a state must agree to establish a goal of serving all handicapped persons, aged three to eighteen by September 1, 1978 and persons between the ages of three and twenty-one by September 1, 1980. However, this timetable does not supercede state law or binding court action which does not mandate services to children three to five or eighteen to twenty-one years of age. Also included is a provision for the utilization of Federally funded incentive awards for programs focusing upon early identification, screening and intervention.

## Counting Limitation

In order to prevent states from inflating the incidence rate of handicapped persons requiring services, the Act limits the number of children who may be counted to twelve percent of the total school age population between the ages of five and seventeen. In addition, mo more than one-sixth (two percent) of a state's total count may consist of children with specific learning disabilities. Children who are counted under Title I of the Elementary and Secondary Education Act (P.L. 89-313) may not be counted under the new program.

## Formula

Public Law 94-142 establishes a formula in which the Federal government makes a commitment to pay a gradually escalating percentage of the national average per pupil expenditure (NAPPE) for students enrolled in public elementary and secondary schools in the United States times the number of handicapped children being served in the school districts of each state in the nation. That percentage will swell on a yearly basis until 1982 when it will become a permanent 40 percent for that year and all subsequent years.

The new formula will be effective in fiscal year 1978. During the interim, the Mathias entitlement will be extended to apply for fiscal years 1976 and 1977 with the estimated allocation established at approximately $100 million and $200 million, respectively.

## Entitlement Ceilings

Appropriations ceilings applicable under P.L. 94-142 will be determined by multiplying a specified percentage of the NAPPE times the number of handicapped persons served from age three to twenty-one years. On the basis of the current national figures, the following authorization limitations are generated for the initial five-year funding period:

1978 @(5% of NAPPE) X # of handicapped persons = $387 million

1979 @(10% of NAPPE) X # of handicapped persons = $775 million

1980 @(20% of NAPPE) X # of handicapped persons = $1.5 billion

1981 @(30% of NAPPE) X # of handicapped persons = $2.32 billion

1982 @(40% of NAPPE) X # of handicapped persons = $3.1 billion

1983 on - P.L. 94-142 establishes a permanent authorization with no expiration date

It should be carefully noted that such a formula includes an inflation factor, i.e., the actual allocation will fluctuate with inflationary/deflationary adjustments in the National Average Per Pupil Expenditure.

Should actual appropriations be less than the amount necessary to grant full entitlements, the Act provides for a prorated reduction in each state's allotment. Also included is "hold harmless" language which assumes that no state will receive less than the allocation under the final year of the Mathias formula, fiscal year 1977.

### Pass Through

Public Law 94-142 establishes the provision for considerable assistance to be "passed through" to the local educational agencies, (LEAs). During the initial year (1978) of the new entitlement formula, 50 percent of the monies assigned to each state would be allocated to the State Education Agency (SEA) and 50 percent would be allocated to the LEA. In the subsequent year (1979), the LEA entitlement would swell to 75 percent of the total allocation to a given state, with the SEA retaining 25 percent. This 75-25 arrangement coming in fiscal year 1979 becomes the permanent distribution proportion. The current state control of all funds under the Mathias legislation will be retained for the remainder of fiscal year 1976 and fiscal year 1977, in which an appropriations ceiling will be imposed at $100 million and $200 million, respectively.

### Administrative Costs

From fiscal year 1978 on, a state is permitted to utilize five percent of the total funds received under the Act or $200,000, whichever is greater. The remaining twenty percent of its Federal funds must be disbursed for technical assistance and support services to IEAs and LEAs.

## SECTION 612 - "ELIGIBILITY"

In order to qualify for assistance under this subcomponent, a state must demonstrate to the Commissioner of Education they it has successfully met the following conditions:

1. Developed an effective policy which assures all handicapped persons the right to a free appropriate and public education

2. The state has submitted a plan to assure that:

    a. The goal of full educational opportunity for all handicapped persons has been established, as well as a detailed timetable and description of the personnel, facilities and services necessary to satisfy said objective.

    b. Free appropriate education will be available for all handicapped children ages three to eighteen not later than September 1, 1978; and all handicapped children ages three to twenty-one not later than September 1, 1980.

c. All handicapped children residing in the state will be identified, located and evaluated, and that a method is implemented to determine which children are receiving special education and related services and which children are not receiving needed special education and related services.

d. Amendments to the State Plan must be available to the general public, thirty days prior to submission to the Commissioner of Education.

3. The state has established the following priorities for providing special education:

    a. First with respect to those handicapped persons who are unserved, and

    b. Secondly, for those persons within each disability area, who are severely and profoundly handicapped.

4. Each LEA in the state must maintain records of the individualized education program for each child and such instructional planning shall include appropriate objective criteria and evaluation procedures and must be reviewed and revised (at least) annually.

    Opportunity for input in the development of each educational blueprint is afforded to all principles in the educational environment. Included should be representatives of the administrative, institutional and diagnostic staffs, as well as the child and his/her parents.

5. The state has established:

    a. Procedural safeguards.

    b. Procedures to insure that handicapped children are trained in the least restrictive environment.

    c. Procedures to assure testing and evaluation will be handled so as not to be racially or culturally discriminatory testing and evaluation in native language.

6. The state educational agency shall be held accountable for carrying out the responsibilities related to the supervision of all special education programs.

7. The state shall assure that the following due process procedures are established and maintained:

    a. Parents and guardians are consulted.

    b. Public hearings with adequate notice and comment are provided.

Due process safeguards incorporated in the 1974 amendments, P.L. 93-380, will prevail, while additional language establishes further provisions designed to protect the interests of the handicapped and their parents. As delineated forthwith, grievance procedures are available at the local and state levels with subsequent options of civil action in State or Federal court.

## SECTION 613 - "STATE PLANS"

Any state satisfying the eligibility requirements and desirous of receiving Federal assistance under this Act must submit a State Plan (through the SEA) to the Commissioner of Education. This plan must include:

1. Assurances that funds will be properly controlled and expended.

2. A description of programs and procedures for the development and implementation of a plan for personnel development, as well as for adopting promising educational practices.

3. Policies and procedures to assure that handicapped child in private elementary and secondary schools and those enrolled in private institutions and schools shall participate in programs and receive similar benefits as public school children.

4. Policies and procedures to recover funds if a person is erroneously classified as eligible.

5. Provisions for making reports, keeping records and permitting access to said records. Reports are to be made to, in a form and including information as required by the Commissioner.

6. Procedures for appeal and hearing for local and intermediate educational agencies.

7. A satisfactory assurance that Federal funds will not be commingled with state funds; will be used to supplement and to increase the level of state and local funds, and will not supplant state and local funds unless a state can present clear and convincing evidence that all handicapped children in the state have available to them a free and appropriate education.

8. A satisfactory assurance that fiscal control and fund accounting procedures will be adopted.

9. Evaluation procedures, at least annually, for effectiveness of programs in meeting needs of handicapped.

10. The establishment of a state planning and advisory panel.

The Commissioner of Education is directed to approve state plans which meet established criteria and disapprove state plans which do not, but shall not disapprove a state plan except after providing appropriate due process provisions (i.e., reasonable notice and an opportunity for a hearing).

## SECTION 614 - "APPLICATION"

Local or Intermediate Educational Agencies (IEAs) desirous of receiving Federal funding under this Act must submit an official application to the appropriate SEA. This application must include:

1. A satisfactory assurance that payments under this part will be used for excess costs (essentially those costs in excess of the Average Annual Per Pupil Expenditure) directly attributable to programs which—
    a. Provide that all children within the agency who are handicapped and in need of special education and related services will be identified, located and evaluated; will provide for inclusion of practical method for determining which children are currently receiving needed special education and related services, and which children are not currently receiving such education and services.
    b. Establish policies and procedures regarding confidentiality of data.
    c. Establish a goal of providing full educational opportunities to all handicapped children.
    d. Establish a timeline for accomplishing the goal described in (c) above.
    e. Establish a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (c).
2. Have a plan for record keeping.
3. Have a provision for making the application and all related pertinent documentation, available to the general public.
4. Have a satisfactory assurance that individualized educational programs for each handicapped person will be (at least) annually reviewed, and revised, if appropriate.

SEAs shall approve local or intermediate plans which satisfy the aforementioned criteria, providing the proposed activities are consistent with the intent of the State Plan and said plan has been submitted to the Commissioner. This section also provides due process procedures for LEAs and IEAs whose applications have been deemed unacceptable.

SEAs may refuse to pass-through Federal monies to IEAs or LEAs when:

1. The applicant does not conform with the overall State Plan requirements.
2. The applicant fails to satisfy requirements under this Section.
3. The State deems the LEA unable to effectively utilize its entitlement.
4. The program is insufficient in size and scope.
5. The applicant cannot generate an allocation for itself of not less than $7,500 after counting all the handicapped it serves.

Reallocation of funds may occur when ever a State determines an IEA of LEA is appropriately providing educational programs and services with funds otherwise available. Monies under this Act may then be distributed to other local or intermediate units not adequately providing special education and related services.

## SECTION 615 -"PROCEDURAL SAFEGUARDS"

SEAs, IEAs and LEAs must establish and maintain the following due process provisions:

1. Opportunity for parents and guardians to examine all records.
2. Procedures to protect the rights of children without parents or guardians.
3. Written prior notice on proposal or refusal to change the identification, evaluation or educational placement of the child.
4. Procedures to assure that notice of (c) above are written in native language, if possible.
5. Opportunity to present complaints.

Upon complaint, a parent or guardian shall be entitled to have a due process hearing conducted by state, intermediate or local educational agency, as determined by state law or the SEA.

If a hearing is conducted by the LEA or IEA then an appeal to the State becomes the opportunity of the complainant. If no such appeal is allowed, then the party can bring civil suit in State court or United States District Court.

## SECTION 616 - "WITHHOLDING AND JUDICIAL REVIEW"

Whenever the Commissioner of Education finds that there has been a failure to substantially comply with the provisions of this Act, provided adequate notice has been served a hearing has transpired, payments to the State shall be withheld. The notification provided by the Commissioner to the SEA, incorporates payment under other laws. Therefore, non-compliance with P.L. 94-142, places in jeopardy other sources of Federal Funding for the handicapped, specifically those monies received under:

1. Part A of the Elementary and Secondary Act.
2. Title III of the Elementary and Secondary Act, its successor Part C, Section 431 of P.L. 93-380.

3. Vocational Education Act.

The State has the right to appeal action by the Commissioner by filing with the United States Court of Appeals. At that point, the Court may remand the case back to the Commissioner for further evidence and the Commissioner may make new or modified findings. The Court may then affirm or set aside the modified findings. The judgment of the Appeals Court may then, on appeal, be subject to review by the United States Supreme Court.

## SECTION 617 - "ADMINISTRATION"

In fulfilling his/her duties the Commissioner of Education is required to:

1. Cooperate with, and furnish assistance to States on matters of education to handicapped children.
2. Provide short term training programs and institutes.
3. Disseminate information.
4. Assure that each State, within one year after date of enactment of this act, provide certification of the actual number of handicapped children served.
5. Prescribe a uniform financial report to be utilized by SEA in submitting State Plans.
6. Issue, amend and revoke rules and regulations as necessary.
7. With the Secretary of the Department of Health, Education and Welfare, take appropriate action to assure protection and confidentiality of data, information and records collected and maintained by the Commissioner and by SEAs and LEAs.
8. Authorize the hiring of qualified personnel for data collection duties.

## SECTION 618 - "EVALUATION"

The Commissioner of Education is required to:

1. Measure and evaluate the impact of programs and the the effectiveness of State efforts to assure the free appropriate public education of all handicapped children in the least restrictive environment.
2. Conduct studies, investigations and evaluations as necessary to assure effective implementation.

In order to carry out such analysis and evaluation responsibilities, the Commissioner shall:

1. Provide Congress and the general public annually, and update annually, programmatic information regarding programs and projects.
2. Provide for the evaluation of programs and projects through the development of effective methods and procedures for evaluation; testing and validation of such evaluation methods and procedures; and conducting actual evaluation studies.

3. In developing and furnishing information regarding total (Federal, State, Local) expenditures, may base such information on a sampling of data available from State and local agencies.
4. Not later than one hundred twenty days after close of each fiscal year, report on progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities.

## SECTION 619 - "INCENTIVE GRANTS"

Public Law 94-14] includes a special incentive grant aimed at encouraging the States to provide special education and related services to its preschool handicapped children. Each handicapped child in the state aged three to five who is counted as served will generate a special $300 entitlement. It should be noted that this incentive entitlement goes to the State Education Agency and must be used by the SEA to provide preschool services. Additionally, this entitlement is a separate appropriation, independent of the larger entitlement.

## SECTION 620 - "PAYMENTS"

The Commissioner shall make payments to each eligible state. The SEA shall then distribute payments to IEAs and LEAs, subsequent to approving applications from these agencies.

Payments may be made in advance or by way of reimbursement and in installment as determined necessary by the Commissioner.

No later than one year after this section becomes effective the Commissioner must prescribe:

1. Regulations to establish criteria for designation of children with specific learning disabilities.
2. Regulations which establish diagnostic procedures to place child in category of specific learning disabilities.
3. Regulations to establish monitoring procedures to determine if SEAs, IEAs and LEAs are complying with criteria (1) and (2) above.

The aforementioned regulations are subject to a Congressional Committee review prior to publication.

## SECTIONS 606, 607, 653 - "AMENDMENTS"

### Employment

Public Law 94-142 stipulates that recipients of Federal assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals.

### Architectural Barriers

The Act also authorizes such sums as may be necessary for the Commissioner to award grants to pay all or part of the cost of altering existing buildings and equipment to eliminate architectural barriers in educational facilities. Such provision is aimed at assuring certain handicapped children an appropriate public education in the least restrictive environment.

### Educational Media and Material Centers

Authorization has been provided for the establishment and operation of centers on educational media and materials for the handicapped. The operation and establishment of these centers are intended to provide a comprehensive program of activities to facilitate the use of new educational technology in programs for the handicapped.

## REGULATIONS REQUIRED AND PROPOSED TIME LIMITS

| Regulation | Time Limit |
|---|---|
| Criteria for allocating funds (fiscal year 1978) | January 1, 1977, but perhaps as early as July 26, 1976 |
| Promulgation of rules to carry out Sections 611-"Entitlements and Allocations" and Section 612-"Eligibility" | March 28, 1977 |
| Prescription of a uniform financial report for the States | January 1, 1977, but perhaps as early as July 26, 1976 |
| Prescription of regulations concerning criteria regarding specific learning disabilities, inclusive of diagnostic and monitoring procedures | November 28, 1976 |
| Evaluation criteria prescribed | January 1, 1977 |

## THOUGHTS TO PONDER

### Presidential Concern

Public Law 94-142 calls for the establishment of a new Federal role in handicapped education and will call for careful state/local/federal negotiations in the months ahead. Although President Ford signed S.6 into law (94-142) he charged the Act would "unnecessarily assert Federal control over traditional State and local government functions" (*Educational Daily*, December 31, 1975) and has already promised to ask Congress to amend it on that point before 1978. The administration maintains the Federal government should confine itself to "supportive" services to SEAs, IEAs and LEAs.

Additionally, in a statement issued at the time of signing, the President noted he was not opposed to providing educational programs and services to all handicapped children, rather he did not think the entitlement levels authorized by the law could be satisfied if federal expenditures are to be controlled and if a balanced budget is to be achieved. (Note: the obligation to education to all handicapped children is independent of the Federal government's fiscal responsibility, therefore the mandate to comply with specified components of the law will remain effective, irrespective of appropriation level).

The President intends to work with the Congress to design a program which will recognize the appropriate Federal role in assisting SEAs, IEAs and LEAs to fulfill their responsibilities in educating the handicapped. He indicated that amendments would be forwarded to the Congress which would accomplish said purposes, prior to the time when the law becomes fully effective in fiscal year 1978.

## Concluding Comments

Passage of P.L. 94-142 marks a significant milestone in the Nation's efforts to provide full and appropriate educational services for the handicapped and the culmination of four years of unrelenting effort by both sponsors and supporters of the legislation. However, the real barometer of the effectiveness of the legislation will remain in the ability of advocates for the handicapped to convince Congress, state legislatures and local school boards to appropriate sufficient funds to carry out the full services mandate outlined in the Act.

It can be anticipated that due to the considerable lack of closure relative to numerous substantive issues, implementation of the provisions of P.L. 94-142 will require extensive and arduous efforts. P.L. 94-142 is perhaps one of the single most important Acts impacting upon the educational needs of the handicapped. The enormous expenditure of time and energy necessary to carry its intent into action must be balanced with an objective face-value perception -- namely, P.L. 94-142 is representative of the activation of a long-awaited equalization of treatment mandate or "Bill of Rights" for the handicapped. Therefore, specification and implementation of required activities must proceed and be concluded without delay.

# Education for All Handicapped Children Act of 1975

PL 94-142

Published in 1976 by
The Council for Exceptional Children
1920 Association Drive
Reston, Virginia 22091

## Education for All Handicapped Children Act of 1975

The federal Education for All Handicapped Children Act (P.L.94-142) is the result of nearly 4 years of intensive legislative development, culminating when President Gerald Ford affixed his signature to this historic legislation on November 29, 1975. After extensive hearings conducted by both Chambers of the Congress, hearings held in Washington, D.C., and around the nation, the Senate version of P.L. 94-142 (S.6) was approved on June 18, 1975, by a vote of 83 to 10. Approximately one month later, on July 29, the House of Representatives followed suit, approving its version by a vote of 375 to 44.

Subsequently, the joint House-Senate compromise bill, usually referred to as the "conference agreement," was approved by even larger margins. The House affirmed the conference agreement by a lopsided 404 to 7, 29 more votes of approval than the bill enjoyed at first passage. The Senate followed with an equally overwhelming "aye" of 87 to 7.

The complete text of P.L. 94-142, the Education for All Handicapped Children Act, follows.

## COMPLETE TEXT OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

### EXTENSION OF EXISTING LAW

Sec. 2. (a) (1) (A) Section 611 (b) (2) of the Education of the Handicapped Act (20 U.S.C. 1411 (b) (2)) (hereinafter in this Act referred to as the "Act"), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(B) Section 611 (c) (1) of the Act (20 U.S.C. 1411 (c) (1)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(2) Section 611 (c) (2) of the Act (20 U.S.C. 1411 (c) (2)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977", and by striking out "2 per centum" each place it appears therein and inserting in lieu thereof "1 per centum".

(3) Section 611 (d) of the Act (20 U.S.C. 1411 (d)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977".

(4) Section 612 (a) of the Act (20 U.S.C. 1412 (a)), as in effect during the fiscal years 1976 and 1977, is amended—

(A) by striking out "year ending June 30, 1975" and inserting in lieu thereof "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977", and

(B) by striking out "fiscal year 1974" and inserting in lieu thereof "preceding fiscal year". (b) (1) Section 614 (a) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat.580) is amended by striking out "fiscal year 1975," and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(2) Section 614 (b) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(3) Section 614 (c) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

(c) Section 612 (a) of the Act, as in effect during the fiscal years 1976 and 1977, and as amended by subsection (a) (4), is amended by inserting immediately before the period at the end thereof the following: ", or $300,000, whichever is greater".

(d) Section 612 of the Act (20 U.S.C. 1411), as in effect during the fiscal years 1976 and 1977, is ammended by adding at the end thereof the following new subsection:

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975, prescribe and publish in the Federal Register such rules as he considers necessary to carry out the provisions of this section and section 611.".

(e) Notwithstanding the provisions of section 611 of the Act as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act, as in effect during such fiscal years.

## STATEMENT OF FINDINGS AND PURPOSE

Sec. 3. (a) Section 601 of the Act (20 U.S.C. 1401) is amended by inserting "(a)" immediately before "This title" and by adding at the end thereof the following new subsections:

"(b) The Congress finds that——

" (1) there are more than eight million handicapped children in the United States today:

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) it is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612 (2) (B), a free appropriate public education which empahsizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.".

(b) The heading for section 601 of the Act (20 U.S.C 1401) is amended to read as follows:

"SHORT TITLE:
STATEMENT OF FINDINGS AND PURPOSE"

## DEFINITIONS

Sec. 4. (a) Section 602 of the Act (20 U.S.C. 1402 is amended——

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediatedly after "impaired children" the following: ", or children with specific learning disabilities,";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after " environmental" the following: ", cultural, or economic", and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614 (a) (5).

"(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

"(20) The term 'excess costs' means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

"(21) The term 'native language' has the meaning given that term by section 703 (a) (2) of the Bilingual Education Act (20 U.S.C. 880b—1 (a) (2)).

"(22) The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.".

(b) the heading for section 602 of the Act (20 U.S.C. 1402) is amended to read as follows:

"DEFINITIONS"

## ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

Sec. 5. (a) Part B of the Act (20 U.S.C. 1411 et seq.) is amended to read as follows:

"PART B.—ASSISTANCE FOR EDUCATION
OF ALL HANDICAPPED CHILDREN

"ENTITLEMENTS AND ALLOCATIONS

"Sec. 611. (a) (1) Except as provided in paragraph (3) and in section 619, the maximum amount of the grant to which a State is entitled under this part for any fiscal year shall be equal to ——

"(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;
multiplied by——
"(B) (i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;
"(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States'
"(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;
"(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and
"(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States; except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

"(2) For the purpose of this subsection and subsection (b) through subsection (e), the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the average of the number of such children receiving special education and related services on October 1 and February 1 of the fiscal year preceding the fiscal year for which the determination is made.

"(4) For purposes of paragraph (1) (B), the term 'average per pupil expenditure', in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

"(5) (A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

"(i) handicapped children in such State under paragraph (1) (A) to the extent the number of children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State;
"(ii) as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and
"(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

"(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

"(b) (1) Of the funds received under subsection (a) by any State for the Fiscal year ending September 30, 1978——

"(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and
"(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612 (3).

"(2) Of the funds which any State may use under paragraph (1) (A) ——

"(A) an amount which is equal to the greater of ——
"(i) 5 per centum of the total amount of funds received under this part by such State; or
"(ii) $200,000;
may be used by such State for administrative costs related to carrying out sections 612 and 613; and

"(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612 (3).

"(c) (1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

"(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612 (3).

"(2) (A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1) (A)—

"(i) an amount which is equal to the greater of—

"(I) 5 per centum of the total amount of funds received under this part by such State; or

"(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613; and

"(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612 (3).

"(B) The amount expended by any State from the funds available to such State under paragraph (1) (A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

"(3) The provisions of section 613 (a) (9) shall not apply with respect to amounts available for use by any State under paragraph (2).

"(4) (A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

"(i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than $7,500 for such fiscal year; or

"(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614.

"(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2) (B) shall not apply to the use of such funds.

"(d) From the total amount of funds available to local educational agencies and intermediated educational units in any State under subsection (b) (1) (B) or subsection (c) (1) (B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b) (1) (B) or subsection (c) (1) (B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part.

"(e) (1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601 (c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

"(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

"(f) (1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of hendicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part for that fiscal year.

"(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614 (a) and which is approved by the Commissioner. The provisions of section 616 shall apply to any such application.

"(g) (1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availablity, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

## "ELIGIBILITY

"Sec. 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613 (b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criterian prescribed under section 617 (c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614 (a) (5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

"(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613.

## "STATE PLANS

"Sec. 613. (a) Any State meeting the eligibility requirements set forth in 612 and desiring to participate in the program under this part shall submit to th Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall——

"(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611 (b), 611 (c), 611 (d), 612 (2), and 612 (3);

"(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-2, section 305 (b) (8) of such Act (20 U.S.C. 844a (b) (8) or its successor authority, and section 122 (a) (4) (B) of the Vocational Education Act of 1963 (20 U.S.C. 1262 (a) (4) (B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

"(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

"(4) set forth policies and procedures to assure——

"(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

"(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

"(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part for services to any child who is determined to be erroneously classified as eligible to be counted under section 611 (a) or section 611 (d);

"(6) provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property;

"(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of federal funds under this part;

"(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

"(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirements of this clause if he concurs with the evidence provided by the State;

"(10) provide, consistent with procedures prescribed pursuant to section 617 (a) (2), satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part of the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

"(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617; and

"(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

"(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614 (a), except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614 (a).

"(c) The Commissioner shall approve any State plan and any modification thereof which——

"(1) is submitted by a State eligible in accordance with section 612; and

"(2) meets the requirements of subsection (a) and subsection (b).

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

## "APPLICATION

"Sec. 614. (a) A local edcuational agency or an intermediate educational unit which desires to receive payments under section 611 (d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall——

"(1) provide satisfactory assurance that payments under this part will be used for excess costs directly attributable to programs which——

"(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

"(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617 (c);

"(C) establish a goal of providing full educational opportunities to all handicapped children, including——

"(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613 (a) (3);

"(ii) the provision of, and the establishment of priorities for providing a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

"(iii) the participation and consultation of the parents or guardian of such children; and

"(iv) to the maximum extent practicable and consistent with the provisions of section 612 (5) (B), the provision of special services to enable such children to participate in regular education programs;

"(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

"(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C).

"(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

"(3) (A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

"(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

"(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

"(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program of each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

"(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613 (a); and

"(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612 (5) (B), 612 (5) (C) and 615.

"(b) (1) A State educational agency shall approve any application submitted by a local educational agency or an intermendiate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613 (c). A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

"(2) (A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirements set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall——

"(i) make no further payments to such local educational agency or such intermediate educational unit under section 621 until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

"(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

"(B) The provisions of the last sentence of section 616 (a) shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

"(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 which is adverse to the local educational agency or intermediate educational unit involved in such decision.

"(c) (1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 611 (c) (4) (A) (i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

"(2) (A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agency may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611 (d) if an individual application of any such local educational agency had been approved.

"(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613 (a) and which provide participating local educational agencies with joint responsibliities for implementing programs receiving payments under this part.

"(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit.

"(D) Whenever a State educational agency determines that a local educational agency——

"(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);

"(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

"(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part.

"(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611 (d), to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Notwithstanding the provisions of subsection (a) (2) (B) (ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611 (d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

## "PROCEDURAL SAFEGUARDS

"Sec. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b) (1) The procedures required by this section shall include, but shall not be limited to——

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly in not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) if the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel an by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613 (a) (12)).

"(e) (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c) shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

## "WITHHOLDING AND JUDICIAL REVIEW

"Sec. 616. (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(2) that in the administration of the State plan there is a failure to comply with any provision of this part or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613 (a) (2) within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in clause (1) or clause (2), no further payments shall be made to the State under this part or under the Federal programs specified in section 613 (a) (2) within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

"(b) (1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner hereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

"(2) The findings of fact by the Commissioner if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

## "ADMINISTRATION

"Sec. 617. (a) (1) In carrying out his duties under this part, the Commissioner shall——

"(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this part;

"(B) provide such short-term training programs and institutes as are necessary;

"(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

"(D) assure that each State shall, within one year after the date of the enactment of the Education for All Handicapped Children Act of 1975, provide certification of the actual number of handicapped children receiving special and related services in such State.

"(2) As soon as practicable after the date of the enactment of the Education for All Handicapped Children Act of 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this part in order to assure equity among the States.

"(b) In carrying out the provisions of this part, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c)) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

"(c) The Secretary shall take appropriate action, in accordance with the provisions of section 438 of the General Education Provisions Act, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this part.

"(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 618 and to carry out his duties under subsection (a) (1) of this subsection without regard to the provisions of title 5, United States Code, relating to appointments in the competetive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

## "EVALUATION

"Sec. 618. (a) The Commissioner shall measure and evaluate the impact of the program authorized under this part and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

"(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this part. In carrying out his responsibilities under this section, the Commissioner shall——

"(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this part and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this part including——

"(A) the number of handicapped children in each State, within each disability, who require special education and related services;

"(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

"(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 612 (5) (B) and section 614 (a) (1) (C) (iv), and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

"(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

"(E) The amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

"(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this Act; and

"(2) provide for the evaluation of programs and projects assisted under this part through——

"(A) the development of effective methods and procedures for evaluation;

"(B) the testing and validation of such evaluation methods and procedures; and

"(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

"(c) In developing and furnishing information under subclause (E) of clause (1)of subsection(b) the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

"(d) (1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b).

"(2) The Commissioner shall include in each such report——

"(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

"(B) any recommendations for change in the provisions of this part, or any other Federal law providing support for the education of handicapped children; and

"(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 611, including actions undertaken by the Commissioner to carry out provisions of this Act relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized education programs.

"(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

## "INCENTIVE GRANTS

Sec. 619. (a) The Commissioner shall make a grant to any State which——

"(1) has met the eligibility requirements of section 612;
"(2) has a State plan approved under section 613; and
"(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 611 (a) (1) (A).

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

"(b) Each State which——
"(1) has met the eligibility requirements of section 612,
"(2) has a State plan approved under section 613, and

"(3) desires to receive a grant under this section,
shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

"(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

"(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this part for such fiscal year, the maximum amounts which all States may receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(e) In addition to the sums necessary to pay the entitlements under section 611, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

### "PAYMENTS

"Sec. 620. (a) The Commissioner shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this part. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this part after the State educational agency has approved applications of such agencies or units for payments in accordance with section 614 (b).

"(b) Payments under this part may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.".

(b) (1) The Commissioner of Education shall, no later than one year after the effective date of this subsection, prescribe—

(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register.

(3) If the Commission determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term "children with specific learning disabilities", as such term is

defined by section 602 (15) of the Act, he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

(4) For purposes of this subsection:

(A) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(B) The term "Commissioner" means the Commissioner of Education.

(c) Effective on the date upon which final regulations prescribed by the Commissioner of Education under subsection (b) take effect, the amendment made by subsection (a) is amended, in subparagraph (A) of section 611 (a) (5) (as such subparagraph would take effect on the effective date of subsection (a)), by adding "and" at the end of clause (i), by striking out clause (ii), and by redesignating clause (iii) as clause (ii).

## AMENDMENTS WITH RESPECT TO EMPLOYMENT OF HANDICAPPED INDIVIDUALS, REMOVAL OF ARCHITECTUAL BARRIERS, AND MEDIA CENTERS

Sec. 6. (a) Part A of the Act is amended by inserting after section 605 thereof the following new sections:

### "EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"Sec. 606. The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

### "GRANTS FOR THE REMOVAL OF ARCHITECTURAL BARRIERS

"Sec. 607. (a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers.

"(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.".

(b) Section 653 of the Act (20 U.S.C. 1453) is amended to read as follows:

### "CENTERS ON EDUCATIONAL MEDIA AND MATERIALS FOR THE HANDICAPPED

"Sec. 653. (a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this part as the Secretary may prescribe in such agreements. Any such agreement shall——

"(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

"(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

"(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies——

"(1) Which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

"(2) which can serve the educational technology needs of the Model High School for the Deaf ( established under Public Law 89-694).

"(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress."

## CONGRESSIONAL DISAPPROVAL OF REGULATIONS

Sec. 7 (a) (1) Section 431 (d) (1) of the General Education Provisions Act (20 U.S.C. 1232 (d) (1)) is amended by inserting "final" immediately before "standard" each place it appears therein.

(2) The third sentence of section 431 (d) (2) of such Act (20 U.S.C.1232 (d) (2)) is amended by striking out "proposed" and inserting in lieu of thereof "final".

(3) The fourth and last sentences of section 431 (d) (2) of such Act (20 U.S.C. 1232 (d) (2)) each are amended by inserting "final" immediately before "standard".

(b) Section 431 (d) (1) of the General Education Provisions Act (20 U.S.C. 1232 (d) (1)) is amended by adding at the end thereof the following new sentence: "Failure of the Congress to adopt such a concurrent resolution with respect to any such final standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such final standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.".

## EFFECTIVE DATES

Sec. 8. (a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) shall take effect on July 1, 1975.

(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 shall take effect on the date of the enactment of this Act.

(c) The amendments made by sections 4 and 5(a) shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act as amended by this Act, section 617 (a) (1) (D) of the Act, as amended by this Act, section 617 (b) of the Act, as amended by this Act, and section 618 (a) of the Act, as amended by this Act, shall take effect on the date of the enactment of this Act.

(d) The provisions of section 5(b) shall take effect on the date of the enactment of this Act.

federal register

TUESDAY, AUGUST 23, 1977

PART II

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# DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

## Office of Education

■

# EDUCATION OF HANDICAPPED CHILDREN

## Implementation of Part B of the Education of the Handicapped Act

## Title 45—Public Welfare

## CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

## EDUCATION OF HANDICAPPED CHILDREN

### Implementation of Part B of the Education of the Handicapped Act

AGENCY: U.S. Office of Education, HEW.

ACTION: Final regulation.

SUMMARY: These regulations implement amendments to Part B of the Education of the Handicapped Act (as required by the Education for All Handicapped Children Act of 1975) by: (1) amending the existing regulations governing assistance to States for education of handicapped children, (2) adding a new part on incentive grants programs for handicapped children aged three through five, and (3) making certain conforming amendments to the general provisions for State-administered programs.

These regulations govern the provision of formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

These regulations also include the final rules for counting and reporting handicapped children. (The child count rules were published in proposed form on September 8, 1976, and were incorporated into the December 30 proposed regulations for the convenience of the reader.)

EFFECTIVE DATE: October 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4046 Donohoe Building), Washington, D.C. 20202, telephone: 202-472-2265;

or

Thomas B. Irvin, Policy Officer, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4926 Donohoe Building), Washington, D.C. 20202, telephone: 202-245-9405.

SUPPLEMENTARY INFORMATION:

### RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of regulations, and took steps to insure maximum public involvement throughout the entire rulemaking process. A description of these steps is included in the following paragraphs:

Before the proposed rules were drafted, the Office of Education carried out a massive effort to obtain comments and suggestions for developing regulations from interested parties throughout the Nation. This involved participating in approximately 20 meetings about the law conducted on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings and several hundred comments were received.

In June 1976, the Office of Education convened a national writing group of approximately 170 people to develop concept papers for use in writing the regulations. This group was composed of parents, representatives of special interest organizations (i.e., AFT, NEA, private schools), and administrators of State and local schools. These concept papers formed the basis for the proposed regulations.

During the months of July–November, the Office of Education prepared several redrafts of the concept papers and continued to seek inputs on these drafts from various interested parties.

On December 30, 1976, the proposed rules were published in the FEDERAL REGISTER. Written comments and recommendations on the proposed rules were invited for a 60-day comment period ending March 1, 1977; and public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta. Over 1,600 written comments were received during that period, all of which were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

In addition to the above public comment activities, the Office of Education continued with other public participation efforts, including:

(1) Participating in 10 regional meetings of the American Association of School Administrators and other regional meetings with the Council of the Great City Schools;

(2) Conducting a national conference on the regulations for administrators of various State agency programs for the handicapped, and participating in meetings at other national conferences; and

(3) Participating in a special series of meetings organized by the Institute for Educational Leadership and composed of representatives of the National Governors' Conference, the National Conference of State Legislatures, the National Association of State Boards of Education, and the Education Commission of the States.

### ACTION TAKEN ON PUBLIC COMMENTS

### PART 100B—STATE ADMINISTERED PROGRAMS

No comments were received on the proposed amendments to Part 100b, and no changes have been made.

### PART 121A—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The Office of Education conducted a careful review of the public comments received and summarized them by subpart and topic.

A very large number of comments dealt with specific statutory requirements. These comments expressed concerns about the statute and suggested changes to be made in the statutory provisions. However, because they are statutory, the Office of Education is not able to make any changes in the regulations with respect to those points. Some of the statutory provisions on which comments were received, together with concerns about them, are included below:

(1) Free appropriate public education—problems with timelines and concerns about the cost of implementing this requirement;

(2) Priorities—concerns about Federal priorities which are not consistent with State and local priorities;

(3) Individualized education programs—suggestions that the requirement be deleted from the regulation unless more funds are available for implementing it;

(4) Prior notice and other due process procedures—concerns about the amount of detail in these requirements and the time, cost and paper work involved in their implementation;

(5) State educational agency responsibility for general supervision of all special education programs in the State—concerns about lack of authority over other State agencies and the lack of funds to efficiently implement the provision;

(6) Child count—concerns about the dates on which the count must be taken.

Another large number of commenters cited specific concerns or issues with respect to the content of the proposed rules. Because of the large number of comments received, individual comments have been consolidated.

### PART 121M—INCENTIVE GRANTS

Part 121m sets forth the conditions under which States may receive grants to assist in the education of handicapped children aged three through five. Congress established incentive grants in the recognition that when education begins at the earlier stages of development (1) benefits are maximized, (2) additional or more severe handicaps may be prevented, and (3) greater long-term cost effectiveness is realized.

*Comment:* An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age.

*Response:* Section 619 of the Act and the legislative history specify that the use of incentive grant funds is limited to children aged three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

*Comment:* An issue was raised as to whether incentive grant funds may be used for administrative or supervisory costs.

*Response:* The regulation has been amended to make it clear that administrative costs are allowable.

### MINIMUM REGULATION—FUTURE RULEMAKING PLANS

The preamble to the proposed rules contained the following statement regarding minimum regulations:

> The Department sees the development of regulations for implementing Pub. L. 94-142 as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which State and local educational agencies may have in implementing these provisions are not known at this time. Therefore, the Department feels that the most rational approach to follow is (1) to write minimum regulations at this point, and (2) to amend and revise such regulations in the future as need and experience dictate.
>
> Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations, and (2) to expand on the statutory provisions only where additional interpretation sems to be necessary.

Although some commenters felt that more extensive regulations were necessary, many persons who responded to the proposed rules felt that the Office of Education had already over-regulated and should cut back on the rules when they are published in final form. At this juncture, the Office of Education holds to the same position that it took in the proposed rules, and for the same reasons as set forth in that document.

The Office of Education believes that some working experience with this regulation is essential before determining whether there is a need to amend it. Once the regulation becomes effective (Oct. 1, 1977) and people gain experience in implementing it, there will likely be a series of questions raised in individual States which could result in the development of policies and interpretations that would be proposed for addition to these regulations.

### OVERVIEW OF CHANGES IN THE PART 121a REGULATIONS

A substantial number of changes have been made in response to comments received on the proposed rules. However, few of these changes have resulted in adding major substantive requirements. Most of the changes are technical or have been made in an attempt to provide greater clarity or to add more explanatory material.

Extensive use has been made of explanatory comments in the text of the regulations. The purpose of these comments is to attempt, where appropriate, to clarify or further interpret a particular rule, or to provide direction and assistance without imposing additional requirements. For example, an extensive explanation is included under the excess cost requirement and an example is given on how to make the computation under that requirement.

### ORGANIZATION OF REGULATIONS

Three parts of Title 45 of the Code of Federal Regulations are amended by this document:

(1) Part 100b—*State Administered Programs.* This includes certain conforming amendments to the regulations under section 434(b)(1)(A) of the General Education Provisions Act.

(2) Part 121a—*Assistance to States for Education of Handcapped Children.* This is divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports.

(3) Part 121m—*Incentive Grants.* This governs the administration of the incentive grants program for handicapped children aged three through five, authorized under section 619 of the Act.

### ANALYSIS OF REGULATIONS

Appendix A of Part 121a includes an analysis of each subpart, which (1) discusses significant comments received and the action taken with respect to those comments, and (2) explains the basis for any changes made from the proposed rules published on December 30, 1976.

### TOPICAL INDEX

Appendix B of Part 121a includes an index of the major topics in the regulations (e.g., free appropriate public education, priorities, and individualized education program) and the specific sections under which each term is used.

NOTE.—The Department of Health, Education, and Welfare, has determined that this document contains a major proposal requiring preparation of an Economic Impact Analysis (EIA) Statement under Executive Orders 11821 and 11949 and OMB Circular A-107, and certifies that an Economic Impact Analysis has been prepared. However, because the portion of this regulation involving major costs is virtually identical to the content of subpart D of the regulation issued on discrimination against the handicapped under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published May 4, 1977, at 42 FR 22676), the Department has determined that (a) this regulation involves no substantial costs not imposed by Part 84 and (b) the pertinent parts of the EIA Statement for that regulation meet the EIA requirements for this regulation. Both regulations impose the following requirements: (1) appropriate education to handicapped children; (2) identification and evaluation of handicapped children; and (3) procedural safeguards for handicapped children and their parents.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: August 12, 1977.

JOHN ELLIS,

*Acting U.S. Commissioner of Education.*

Approved: August 15, 1977.

HALE CHAMPION,

*Acting Secretary of Health, Education, and Welfare.*

Title 45 of the Code of Federal Regulations is amended as follows:

## PART 100b—STATE ADMINISTERED PROGRAMS

1. In Part 100b, § 100b.17 is revised to read as follows:

**§ 100b.17 General applications.**

(a) The general application of a State must meet the requirements of section 434(b)(1)(A) of the General Education Provisions Act.

(b) A State does not have to resubmit its general application.

(20 U.S.C. 1232c(b)(1)(A).)

(c)(1) The following statutes require that a State must submit certain provisions to the Commissioner which are similar to provisions in the general application.

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provisions required under the following statutes:

(i) *Compensatory education.* Section 142(a) (2) and (3) of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(ii) *School library resources.* Section 203(a) (5), (6) and (7) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III), and (IV).)

(iii) *Supplementary educational centers and services; guidance, counseling, and testing.* Section 305(b) (9)(B), (10), and (11) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(iv) *Education of the handicapped.* Section 613(a) (7)(A), (9)(B), and (10) of Part B of the Education of the Handicapped Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(v) *Adult education.* Section 306(a) (6) and (7) of the Adult Education Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(vi) *Strengthening instruction in academic subjects.* Section 1004(a) (2) and (3) of Title X of the National Defense Education Act of 1958, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii), (II), (III).)

(vii) *State reading improvement programs.* Section 714(a)(10) of Title VII-B of the Education Amendments of 1974.

(20 U.S.C. 1232c(b)(1)(A)(ii), (III).)

(d)(1) The general application does not change the legal substance of the provisions listed under paragraph (c)(2) of this section.

(2) If a provision listed in paragraph (c)(2) of this section is different in wording from an assurance in the general application, the provision listed in that paragraph governs any question of compliance with the assurance.

(20 U.S.C. 1232c(b)(1)(B)(i), (b)(1)(B)(iii), (b)(2).)

2. In Part 100b, § 100b.35 is revised to read as follows:

**§ 100b.35 Effective date of an application, plan, or amendment.**

(a) Federal funds are available only for obligations incurred under:

(1) A State plan approved by the Commissioner (in the case of the programs set forth in § 100b.10 other than those referenced in § 100b.15(a)); or

(2) A general application and an annual program plan approved by the Commissioner in the case of the programs referenced in § 100b.15(a)).

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

(c) The Commissioner sends the State agency a notice of approval, including notice of the effective date, when the application, plan, or amendment is approved.

(d) Federal funds are not available for obligation by a State or local agency before the effective date of the State plan or annual program plan (whichever is submitted under paragraph (a) of this section). If funds are expressly made available by statute for the development of the State plan, general application, or annual program plan, the first sentence of this paragraph does not apply to obligations by the State for that purpose.

(20 U.S.C. 1221e-3(a)(1).)

3. In Part 100b, § 100b.55 is revised to read as follows:

**§ 100b.55 Obligation by recipients.**

(a) *Period for obligation*. Federal funds which the Federal government may obligate during a fiscal period remain available for obligation by State and local recipients through the end of that fiscal period. Federal funds made available for construction of facilities remain available for obligation by State and local recipients for that purpose for a reasonable period of time as determined by the Commissioner.

(b) *Carryovers*. In accordance with section 414(b) of the General Education Provisions Act, any Federal funds which are not obligated by State and local recipients before the end of the fiscal period under paragraph (a) of this section, remain available for obligation by those agencies for one additional fiscal year.

(c) *Determinations of obligation*. (1) An obligation for the acquisition of real or personal property, for the construction of facilities, or for the performance of work, is incurred by a recipient on the date it makes a binding written commitment.

(2) An obligation for personal services, for services performed by public utilities, for travel, or for the rental of real or personal property, is incurred by a recipient on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(20 U.S.C. 1221c(a); 1225(b); 1232c(b)(1)(A)(ii)(II).)

4. Part 121a is revised to read as follows:

## PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

### Subpart A—General

#### PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Sec.
121a.1 Purpose.
121a.2 Applicability to State, local, and private agencies.
121a.3 General provisions regulations.

#### DEFINITIONS

121a.4 Free appropriate public education.
121a.5 Handicapped children.
121a.6 Include.
121a.7 Intermediate educational unit.
121a.8 Local educational agency.
121a.9 Native language.
121a.10 Parent.
121a.11 Public agency.
121a.12 Qualified.
121a.13 Related services.
121a.14 Special education.
121a.15 State.

### Subpart B—State Annual Program Plans and Local Applications

#### ANNUAL PROGRAM PLANS—GENERAL

121a.110 Condition of assistance.
121a.111 Contents of plan.
121a.112 Certification by the State educational agency and attorney general.
121a.113 Approval; disapproval.
121a.114 Effective period of annual program plan.

#### ANNUAL PROGRAM PLANS—CONTENTS

121a.120 Public participation.
121a.121 Right to a free appropriate public education.
121a.122 Timelines and ages for free appropriate public education.
121a.123 Full educational opportunity goal.
121a.124 Full educational opportunity goal—data requirement.
121a.125 Full educational opportunity goal—timetable.
121a.126 Full educational opportunity goal—facilities, personnel, and services.
121a.127 Priorities.
121a.128 Identification, location, and evaluation of handicapped children.
121a.129 Confidentiality of personally identifiable information.
121a.130 Individualized education programs.
121a.131 Procedural safeguards.
121a.132 Least restrictive environment.
121a.133 Protection in evaluation procedures.
121a.134 Responsibility of State educational agency for all educational programs.
121a.135 Monitoring procedures.
121a.136 Implementation procedures—State educational agency.
121a.137 Procedures for consultation.
121a.138 Other Federal programs.
121a.139 Comprehensive system of personnel development.
121a.140 Private schools.
121a.141 Recovery of funds for misclassified children.
121a.142 Control of funds and property.
121a.143 Records.
121a.144 Hearing on application.
121a.145 Prohibition of commingling.
121a.146 Annual evaluation.
121a.147 State advisory panel.
121a.148 Policies and procedures for use of Part B funds.
121a.149 Description of use of Part B funds.
121a.150 Nondiscrimination and employment of handicapped individuals.
121a.151 Additional information if the State educational agency provides direct services.

#### LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

121a.180 Submission of application.
121a.181 Responsibilities of State educational agency.
121a.182 The excess cost requirement.
121a.183 Meeting the excess cost requirement.
121a.184 Excess costs—computation of minimum amounts.
121a.185 Computation of excess costs—consolidated application.
121a.186 Excess costs—limitation on use of Part B funds.
121a.190 Consolidated applications.
121a.191 Payments under consolidated applications.
121a.192 State regulation of consolidated applications.
121a.193 State educational agency approval; disapproval.
121a.194 Withholding.

#### LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

121a.220 Child identification.
121a.221 Confidentiality of personally identifiable information.
121a.222 Full educational opportunity goal; timetable.
121a.223 Facilities, personnel, and services.
121a.224 Personnel development.
121a.225 Priorities.
121a.226 Parent involvement.
121a.227 Participation in regular education programs.
121a.228 Public control of funds.
121a.229 Excess cost.
121a.230 Nonsupplanting.
121a.231 Comparable services.
121a.232 Information—reports.
121a.233 Records.
121a.234 Public participation.
121a.235 Individualized educaton program.
121a.236 Local policies consistent with statute.
121a.237 Procedural safeguards.
121a.238 Use of Part B funds.
121a.239 Nondiscrimination and employment of handicapped individuals.
121a.240 Other requirements.

#### APPLICATION FROM SECRETARY OF INTERIOR

121a.260 Submission of annual application; approval.
121a.261 Public participation.
121a.262 Use of Part B funds.
121a.263 Applicable regulations.

#### PUBLIC PARTICIPATION

121a.280 Public hearings before adopting an annual program plan.
121a.281 Notice.
121a.282 Opportunity to participate; comment period.

121a.283 Review of public comments before adopting plan.
121a.284 Publication and availability of approved plan.

### Subpart C—Services

#### Free Appropriate Public Education

121a.300 Timeliness for free appropriate public education.
121a.301 Free appropriate public education—methods and payments.
121a.302 Residential placement.
121a.303 Proper functioning of hearing aids.
121a.304 Full educational opportunity goal.
121a.305 Program options.
121a.306 Nonacademic services.
121a.307 Physical education.

#### Priorities in the Use of Part B Funds

121a.320 Definitions of "first priority children" and "second priority children."
121a.321 Priorities.
121a.322 First priority children—school year 1977–1978.
121a.323 Services to other children.
121a.324 Application of local educational agency to use funds for the second priority.

#### Individualized Education Programs

121a.340 Definition.
121a.341 State educational agency responsibility.
121a.342 When individualized education programs must be in effect.
121a.343 Meetings.
121a.344 Participants in meetings.
121a.345 Parent participation.
121a.346 Content of individualized education program.
121a.347 Private school placements.
121a.348 Handicapped children in parochial or other private schools.
121a.349 Individualized education program—accountability.

#### Direct Service by the State Educational Agency

121a.360 Use of local educational agency allocation for direct services.
121a.361 Nature and location of services.
121a.370 Use of State educational agency allocation for direct and support services.
121a.371 State matching.
121a.372 Applicability of nonsupplanting requirement.

#### Comprehensive System of Personnel Development

121a.380 Scope of system.
121a.381 Participation of other agencies and institutions.
121a.382 Inservice training.
121a.383 Personnel development plan.
121a.384 Dissemination.
121a.385 Adoption of educational practices.
121a.386 Evaluation.
121a.387 Technical assistance to local educational agencies.

### Subpart D—Private Schools

#### Handicapped Children in Private Schools Placed or Referred by Public Agencies

121a.400 Applicability of §§ 121a.401–121a.403.
121a.401 Responsibility of State educational agency.
121a.402 Implementation by State educational agency.
121a.403 Placement of children by parents.

#### Handicapped Children in Private Schools Not Placed or Referred by Public Agencies

121a.450 Applicability of §§ 121a.451–121a.460.
121a.451 State educational agency responsibility.
121a.452 Local educational agency responsibility.
121a.453 Determination of needs, number of children, and types of services.
121a.454 Service arrangements.
121a.455 Differences in services to private school handicapped children.
121a.456 Personnel.
121a.457 Equipment.
121a.458 Prohibition of segregation.
121a.459 Funds and property not to benefit private school.
121a.460 Existing level of instruction.

### Subpart E—Procedural Safeguards

#### Due Process Procedures for Parents and Children

121a.500 Definitions of "consent", "evaluation", and "personally identifiable".
121a.501 General responsibility of public agencies.
121a.502 Opportunity to examine records.
121a.503 Independent educational evaluation.
121a.504 Prior notice; parent consent.
121a.505 Content of notice.
121a.506 Impartial due process hearing.
121a.507 Impartial hearing officer.
121a.508 Hearing rights.
121a.509 Hearing decision; appeal.
121a.510 Administrative appeal; impartial review.
121a.511 Civil action.
121a.512 Timeliness and convenience of hearings and reviews.
121a.513 Child's status during proceedings.
121a.514 Surrogate parents.

#### Protection in Evaluation Procedures

121a.530 General.
121a.531 Preplacement evaluation.
121a.532 Evaluation procedures.
121a.533 Placement procedures.
121a.534 Reevaluation.

#### Least Restrictive Environment

121a.550 General.
121a.551 Continuum of alternative placements.
121a.552 Placements.
121a.553 Nonacademic settings.
121a.554 Children in public or private institutions.
121a.555 Technical assistance and training activities.
121a.556 Monitoring activities.

#### Confidentiality of Information

121a.560 Definitions.
121a.561 Notice to parents.
121a.562 Access rights.
121a.563 Record of access.
121a.564 Records on more than one child.
121a.565 List of types and locations of information.
121a.566 Fees.
121a.567 Amendment of records at parent's request.
121a.568 Opportunity for a hearing.
121a.569 Result of hearing.
121a.570 Hearing procedures.
121a.571 Consent.
121a.572 Safeguards.
121a.573 Destruction of information.
121a.574 Children's rights.
121a.575 Enforcement.
121a.576 Office of Education.

#### Office of Education Procedures

121a.580 Opportunity for a hearing.
121a.581 Hearing panel.
121a.582 Hearing procedures.
121a.583 Initial decision; final decision.
121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.
121a.590 Withholding payments.
121a.591 Reinstating payments.
121a.592 Public notice by State and local educational agencies.
121a.593 Judicial review of Commissioner's final action on annual program plan.

### Subpart F—State Administration

#### State Educational Agency Responsibilities; General

121a.600 Responsibility for all educational programs.
121a.601 Monitoring and evaluation activities.
121a.602 Adoption of complaint procedures.

#### Use of Funds

121a.620 Federal funds for State administration.
121a.621 Allowable costs.

#### State Advisory Panel

121a.650 Establishment.
121a.651 Membership.
121a.652 Advisory panel—functions.
121a.653 Advisory panel—procedures.

### Subpart G—Allocation of Funds; Reports

#### Allocations

121a.700 Special definition of the term State.
121a.701 State entitlement; formula.
121a.702 Limitations and exclusions.
121a.703 Ratable reductions.
121a.704 Hold harmless provision.
121a.705 Within-State distribution: fiscal year 1978.
121a.706 Within-State distribution: fiscal year 1979 and after.
121a.707 Local educational agency entitlement; formula.
121a.708 Reallocation of local educational agency funds.
121a.709 Payments to Secretary of Interior.
121a.710 Entitlements to jurisdictions.

#### Reports

121a.750 Annual report of children served—report requirement.
121a.751 Annual report of children served—information required in the report.
121a.752 Annual report of children served—certification.
121a.753 Annual report of children served—criteria for counting children.
121a.754 Annual report of children served—other responsibilities of the State educational agency.

#### Appendices

Appendix A—Analysis of Final Regulation. (45 CFR Part 121a.) Under Part B of the Education of the Handicapped Act.
Appendix B—Index to Part 121a.

Authority: Part B of the Education of the Handicapped Act, Pub. L. 91–230, Title VI, as amended, 89 Stat. 776–794 (20 U.S.C. 1411–1420), unless otherwise noted.

### Subpart A—General

#### Purpose, Applicability, and General Provisions Regulations

**§ 121a.1 Purpose.**

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note.)

### § 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400–121a.403.)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B).)

*Comment.* The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

### § 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1417(b).)

### DEFINITIONS

*Comment.* Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 121a.500 of Subpart E)
Destruction (Section 121a.560 of Subpart E)
Direct services (Section 121a.370(b)(1) of Subpart C)
Evaluation (Section 121a.500 of Subpart E)
First priority children (Section 121a.320(a) of Subpart C)
Independent educational evaluation (Section 121a.503 of Subpart E)
Individualized education program (Section 121a.340 of Subpart C)
Participating agency (Section 121a.560 of Subpart E)
Personally identifiable (Section 121a.500 of Subpart E)
Private school handicapped children (Section 121a.450 of Subpart D)
Public expense (Section 121a.503 of Subpart E)
Second priority children (Section 121a.320(b) of Subpart C)
Special definition of "State" (Section 121a.700 of Subpart G)
Support services (Section 121a.370(b)(2) of Subpart C)

### § 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1401(18).)

### § 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530–121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which

adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15).)

### § 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b).)

### § 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401(22).)

### § 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401(8).)

### § 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

> The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21).)

*Comment.* Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

### § 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415.)

*Comment.* The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

### § 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); 1413(a).)

### § 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b).)

### § 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17).)

*Comment*. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94–168, p.12 (1975).)

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

### § 121a.14 Special education.

(a) (1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16).)

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16).)

*Comment*. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94–482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

### § 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(6).)

## Subpart B—State Annual Program Plans and Local Applications

### ANNUAL PROGRAM PLANS—GENERAL

### § 121a.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413.)

### § 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b).)

### § 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a).)

### § 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580–121a.583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c).)

### § 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b).)

## ANNUAL PROGRAM PLANS—CONTENTS

### § 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280–121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7).)

### § 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timelines for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3).)

### § 121a.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B).)

### § 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A).)

### § 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978–1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) [illegible] number of handicapped children

(i) [illegible] receiving a free appropriate [illegible]tion,

(ii) Wh[illegible] are not receiving a free approp[illegible] public education,

(iii) Wh[illegible] enrolled in public and private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

*Comment.* In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

### § 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

### § 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and

the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2) (A).)

### § 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320–121a.324 of Subpart C.

(2) The State priorities meet the timelines under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 121a.124(c) (2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3).)

### § 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b) (1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2) (C).)

*Comment.* The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576.

### § 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560–121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2) (D); 1417(c).)

*Comment.* The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94–142. Those regulations are incorporated in § 121a.560–121a.576 of Subpart E.

### § 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4).)

### § 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500–121a.514 of Subpart E are met.

(20 U.S.C. 1412(5(A).)

### § 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550–121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.550–121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5) (B).)

### § 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530–121a.534 of Subpart E are met.

(10 U.S.C. 1412(5) (C).)

### § 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6).)

### § 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1412(6).)

### § 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6).)

### § 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7) (A).)

### § 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c–2), section 305 (b)(8) of that Act (20 U.S.C. 844a(b) (8)) or Title IV–C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a) (2).)

### § 121a.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under §§ 121a.380–121a.387 of Subpart C.

(20 U.S.C. 1413(a) (3).)

### § 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a) (4).)

### § 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a) (5).)

### § 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a) (6).)

### § 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a) (7) (B).)

### § 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a) (8).)

### § 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a) (9).)

*Comment.* This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

### § 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a) (11).)

### § 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650–121a.653 of Subpart F are met.

(20 U.S.C. 1413(a) (12).)

### § 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a) (1).)

### § 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii).)

### § 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

### § 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226–121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b).)

## LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

### § 121a.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

### § 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a)

### § 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i).)

### § 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1402(20); 1414(a)(1).)

*Comment.* The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

### § 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1).)

*Comment.* The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.183. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

*Example:* A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

| | |
|---|---|
| (1) From local tax funds | $2,750,000 |
| (2) From State funds | 7,000,000 |
| (3) From Federal funds | 750,000 |
| | 10,500,000 |

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

| | |
|---|---|
| | $10,500,000 |
| | −500,000 |
| Total expenditures for elementary school students (less capital outlay and debt service) | =10,000,000 |

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

*Example:* The local educational agency spent the following amounts for elementary school students last year:

| | |
|---|---|
| (1) From funds under Title I of the Elementary and Secondary Education Act of 1965 | $300,000 |
| (2) From a special State program for educationally deprived children | 200,000 |
| (3) From a grant under Part B | 200,000 |
| (4) From State funds for the education of handicapped children | 500,000 |

| | |
|---|---|
| (5) From a locally-funded program for handicapped children | $950,000 |
| (6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965 | 150,000 |
| Total | 1,600,000 |

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
−1,600,000
8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

*Example:* Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000
7,000 students
= $1,200 student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However, the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

### § 121a.185 Computation of excess costs—consolidated application.

The minimum average amount under § 121a.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1).)

### § 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1).)

### § 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

### § 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

### § 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)-(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

### § 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220–121a.240. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220–121a.240.

(20 U.S.C. 1414(b)(1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506–121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3).)

### § 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2).)

## LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

### § 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A).)

*Comment.* The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576 of Subpart E.

### § 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560–121a.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B).)

### § 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D).)

### § 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a)(1)(E).)

### § 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a)(1)(C)(i).)

### § 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320–121a.324.

(20 U.S.C. 1414(a)(1)(C)(ii).)

### § 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii).)

### § 121a.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550–121a.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(iv).)

### § 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a)(2)(A).)

### § 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B).)

### § 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B).)

*Comment.* Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in § 121a.230(b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

### § 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C).)

*Comment.* Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 121a.320–121a.324.

### § 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A).)

### § 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B).)

### § 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in § 121a.280–121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(4).)

### § 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5).)

### § 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)–(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6).)

### § 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7).)

### § 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a).)

### § 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405, 29 U.S.C. 794.)

### § 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120–121a.151.

(20 U.S.C. 1414(a)(6).)

## Application from Secretary of Interior

### § 121a.260 Submission of annual application: approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f).)

### § 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280–121a.284.

(20 U.S.C. 1411(f).)

### § 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320–121a.324 of Subpart C.

(20 U.S.C. 1411(f).)

### § 121a.263 Applicable regulations.

The Secretary of Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2).)

## Public Participation

### § 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7).)

### § 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7).)

### § 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7).)

### § 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7).)

### § 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7).)

## Subpart C—Services

### Free Appropriate Public Education

### § 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94-168 p. 19 (1975).)

*Comment.* 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530–121a.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93–380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320–121a.324.

### § 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B).)

### § 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B).)

*Comment.* This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

### § 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B).)

*Comment.* The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

> In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95-381, p. 67 (1977).)

### § 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

*Comment.* In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320–121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94–142:

> The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.
>
> Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally-supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94–168, p. 13 (1975).)

### § 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

*Comment.* The above list of program options is not exhaustive, and could include any program or activity in which non-handicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320-121a.324.

### § 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

### § 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6).)

*Comment.* The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

> Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.
>
> * * * * *
>
> The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975).)

## PRIORITIES IN THE USE OF PART B FUNDS

### § 121a.320 Definitions of "first priority children" and "second priority children.

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3).)

*Comment.* After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

### § 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).)

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975).)

*Comment.* Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly-identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

### § 121a.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c).)

*Comment.* This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

### § 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children, that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii).)

### § 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414 (a)(1)(C)(ii).)

## INDIVIDUALIZED EDUCATION PROGRAMS

### § 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341–121a.349.

(20 U.S.C. 1401(19).)

### § 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1413(a)(4).)

*Comment:* This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

### § 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94–142, Sec. 8(c) (1975).)

*Comment.* Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

### § 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5).)

*Comment.* The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

### § 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

*Comment.* 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

### § 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

*Comment.* The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

### § 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

### § 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

### § 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

### § 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

*Comment.* This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

## DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

### § 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 121a.220-121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182-121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d).)

*Comment.* Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part

B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

### § 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550-121a.556 of Subpart E).

(20 U.S.C. 1414(d).)

### § 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320–121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.-380–121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2).)

### § 121a.371 State matching.

Beginning with the period July 1, 1978–June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B).)

*Comment.* The requirement in § 121a.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

### § 121a.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3).)

## COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

### § 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicaped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3).)

### § 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3).)

### § 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3).)

### § 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3).)

### § 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3).)

### § 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3).)

### § 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

### § 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

## Subpart D—Private Schools

### HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

### § 121a.400 Applicability of §§ 121a.401–121a.403.

Sections 121a.401–121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B).)

### § 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

### § 121a.102 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B).)

### § 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450–121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415).)

### HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

### § 121a.450 Applicability of §§ 121a.451–121a.460.

As used in §§ 121a.451–121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400–121a.403.

(20 U.S.C. 1413(a)(4)(A).)

### § 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452–121a.460 are met.

(20 U.S.C. 1413(a)(4)(A).)

### § 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6).)

### § 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a) (4) (a); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974).)

### § 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.459 Funds and property not to benefit private school.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a) (4) (A).)

### § 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a) (4) (A).)

## Subpart E—Procedural Safeguards

### DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

### § 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417 (c).)

### § 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500–121a.514.

(20 U.S.C. 1415(a).)

### § 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562–121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b) (1) (A).)

### § 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

### § 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1)(C), (D).)

*Comment.* 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

### § 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c)(1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

### § 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2).)

*Comment:* Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

### § 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

### § 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

### § 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c).)

### § 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

*Comment.* 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

### § 121a.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

### § 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

### § 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

*Comment.* Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

### § 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

## PROTECTION IN EVALUATION PROCEDURES

### § 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

### § 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

### § 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

*Comment.* Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

### § 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550–121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5).)

*Comment.* Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

### § 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340—121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c).)

## LEAST RESTRICTIVE ENVIRONMENT

### § 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550–121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv).)

### § 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B).)

### § 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B).)

*Comment.* Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

### § 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

*Comment.* Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

### § 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B).)

*Comment.* Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

### § 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B).)

### § 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B).)

## CONFIDENTIALITY OF INFORMATION

### § 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c).)

*Comment.* Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in pargraph (b).

### § 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c).)

*Comment.* Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

### § 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c).)

### § 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)-(2), (4)-(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

## OFFICE OF EDUCATION PROCEDURES

### § 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

### § 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.530 of this subpart.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

### § 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

### § 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1413(a)(9)(b); 1413(c); 1416.)

### § 121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local Educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580–121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B).)

### § 121a.590 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.580–121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

### § 121a.591 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

### § 121a.592 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a).)

### § 121a.593 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

## Subpart F—State Administration

### STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

### § 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

*Comment.* The requirement in § 121a.600 (a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

### § 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

(1) Collection of data and reports;

(2) Conduct of on-site visits;

(3) Audit of Federal fund utilization; and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413(a)(11).)

*Comment:* In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

### § 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194

(20 U.S.C. 1412(6).)

## USE OF FUNDS

### § 121a.620 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c).)

### § 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c).)

## STATE ADVISORY PANEL

### § 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

### § 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12).)

*Comment.* The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

### § 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the

State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12).)

### § 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12).)

## Subpart G—Allocation of Funds; Reports

### ALLOCATIONS

### § 121a.700 Special definition of the term State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704–121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2).)

### § 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,

(2) 1979—10 percent,

(3) 1980—20 percent,

(4) 1981—30 percent, and

(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

### § 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

### § 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in §121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

### § 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

### § 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1).)

### § 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1).)

### § 121a.707 Local educational agency entitlements: formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

### § 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

### § 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(i).)

### § 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e).)

## REPORTS

### § 121a.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3).)

*Comment.* It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

### § 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b).)

### § 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b).)

### § 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a. 186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b).)

*Comment.* 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

### § 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a) (8); 1417(b).)

*Comment*. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

## APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121a) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

### RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22676; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (§ 84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b) (2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *"

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3–18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

## PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

### SUBPART A—GENERAL

Subpart A sets forth the purposes and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to those terms.

The following comments were received regarding Subpart A.

### APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

*Comment:* A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

*Response:* A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

### DEFINITIONS (§§ 121a.4–121a.15)

*Comment:* Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new definitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

*Response:* Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multihandicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

### SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (sections 121a.150 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 606 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

### ANNUAL PROGRAM PLANS

#### CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plan requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977–1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120–121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted")).

#### APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

#### EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1–June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

#### PUBLIC PARTICIPATION (§ 121a.120)

*Comment:* Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

*Response:* Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

#### FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124–121a.128)

*Comment:* Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

*Response:* The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977–1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977–1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978–1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

*Comment:* Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other professional groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

*Response:* These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

### LOCAL EDUCATIONAL AGENCY APPLICATIONS

#### PARENT INVOLVEMENT (§ 121a.226)

*Comment:* Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

*Response.* No change has been made. Extensive public and parental participation is already required under sections 121a.226 and 121a.234.

### EXCESS COST REQUIREMENTS (§§ 121a.182–121a.186)

*Comment:* A substantial number of commenters requested clarification and explanation of the excess cost requirement.

*Response:* The section on excess costs has been broken out into five sections for easier reading. Section 121a.184 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

### NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.230–121a.231)

*Comment:* A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

*Response:* These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount, on the average, for each of its handicapped children.

*Comment:* Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

*Response:* A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.236.

### APPLICATION FROM SECRETARY OF INTERIOR (§§ 121a.260–121a.261)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

### PUBLIC PARTICIPATION

See the comments on Section 121a.120.

## SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

### FREE APPROPRIATE PUBLIC EDUCATION

### FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§ 121a.300–121a.303)

*Comment:* Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exception to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

*Response:* The requirement has been redrafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeliness for free appropriate public education") breaks "practice" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3–5 and 18–21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

### FREE APPROPRIATE PUBLIC EDUCATION METHODS AND PAYMENTS (§ 121a.301–121a.303)

*Comment:* Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must be borne by the State or local educational agency.

*Response:* The proposed regulation on methods and costs for FAPE (proposed § 121a.201) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301, which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

*Other Changes:* A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," GPO publication date Summer, 1977).

### FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304–121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows: Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Non-academic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

*Comment:* Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts, and occupational education). Other commenters requested that the term "consumer and homemaking education" be substituted for "home economics" in order to be consistent with the vocational education amendments of 1976 (Pub. L. 94–482).

*Response:* No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

*Comment:* Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

*Response:* The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals including those with visual handicaps.

### PHYSICAL EDUCATION (§ 121a.307)

*Comment:* Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program, (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs specially designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

*Response:* The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physical activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

*Other changes:* Proposed section 121a.204 (Incidental use of property) has been deleted.

### Priorities in the Use of Part B Funds

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320–121a.324.

### PRIORITIES (§ 121a.321)

*Comment:* Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students, and stated that such inservice training activities may be an essential component toward achieving the first priority.

*Response:* The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training concurrently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "* * * to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated * * * These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10969)

(2) "First priority for spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p S10961)

*Comment:* Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

*Response:* No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

*Other changes:* A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94–168, p. 34 (1975), in which it was stated that funds for preservice training are available under the training program under Part D of the Act, and that Part B funds should not be used for this purpose.

### Individualized Education Program

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341–121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

### TIMING OF IEP MEETINGS (§§ 121a.342–121a.343)

*Comment:* Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

*Response:* The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEP's must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discretion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

### PARTICIPANTS IN IEP MEETINGS (§ 121a.344)

*Comment:* A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

*Response:* The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parent, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

> In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings * * * be small meetings; that is, confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents, and in some cases the guardian of the child. Certainly the teacher involved or even more than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.
>
> These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

*Comment:* Some commenters recommended that members of the evaluation team participate in IEP meetings.

*Response:* A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

*Comment:* Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

*Response:* A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

### PARENT PARTICIPATION (§ 121a.345)

*Comment:* Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statement requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is not required in the law and is "* * * utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

*Response:* The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

*Comment:* A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

*Response:* The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the state. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

*Other changes.* A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully informed of the program for their child, and will assist them in participating in future meetings on the IEP.

### CONTENT OF IEP (§ 121a.346)

*Comment:* Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

*Response:* The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

### IEP—ACCOUNTABILITY (§ 121a.349)

*Comment:* In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

*Response:* The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

### COLLECTIVE BARGAINING

*Comment:* Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

*Response:* No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

### DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The proposed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

*Comment:* In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

*Response.* Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement. (NOTE.—A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

*Other changes:* A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1979 and for each following fiscal year.

### COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

#### GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

#### SCOPE OF SYSTEM (§ 121a.380)

*Comment:* A commenter suggested that inservice education be available to all special, regular, and related service personnel.

*Response:* Paragraph (a) of section 121a.-380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

*Comment:* A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

*Response:* No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

#### DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED §121a.261)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.261 of the proposed rules. The definition has been deleted in the final regulations. Instead, the term "qualified" is used, as defined in § 121a.12.

*Comment:* A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

*Response:* No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

*Comment:* A commenter suggested that early childhood be required as an area for certification.

*Response:* No change has been made. These personnel must be included under the State's comprehensive personnel development system.

*Comment.* Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

*Response:* The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

#### PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the state plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on those agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation programs, a factor essential to the provision of a "free appropriate public education."

*Comment:* Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

*Response:* The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

*Comment:* A commenter suggested the addition of a subsection (3) to section 121a.-381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

*Response:* Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

#### INSERVICE TRAINING (§ 121a.382)

*Comment:* There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

*Response:* The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education, without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

*Comment:* A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.383(b)(1).

*Response:* No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

*Comment:* A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

*Response:* No change has been made. The State's plan must include all personnel who need training.

*Comment:* Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

*Response:* Changes were made where necessary to bring the regulation into conformity with current usage.

*Comment:* There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentives for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

*Response:* No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

### PERSONNEL DEVELOPMENT PLAN (§ 121a.383)

*Comment:* Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

*Response:* No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

*Comment:* One commenter objected to including preservice training under this section.

*Response:* No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system must include the consideration of preservice training.

NOTE.—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.383 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 *State personnel needs.*

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

### DISSEMINATION (§121a.384)

*Comment:* One commenter suggested that "teachers organizations" be specified as recipients of information.

*Responses:* No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

## SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400–121a.403) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320–121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450–121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300–121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

### RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

*Comment:* A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

*Response.* Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

*Comment:* A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

*Response.* No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

### IMPLEMENTATION BY SEA (§121a.402)

*Comment:* A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

*Response:* No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

### PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

*Comment:* Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

*Response:* The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case, the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450–121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450–121a.460.

*Other changes:* Proposed section 121a.323 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

### HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES (§§ 121a.450–121a.460)

*Comments:* A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

*Response:* The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

## SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some comments sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulation should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review experience under the regulations, and then made a determination as to whether more detailed regulations are required.

## DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

### DEFINITIONS (§ 121a.500)

*Comment:* Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

*Response:* The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

*Comment:* Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

*Response:* No change has been made. The suggestion reagarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

### GENERAL RESPONSIBILITY OF PUBLIC AGENCIES (§ 121a.501)

*Comment:* Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

*Response:* No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

### INDEPENDENT EDUCATIONAL EVALUATION (§ 121a.503)

*Comment:* Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

*Response:* The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

### PRIOR NOTICE; PARENT CONSENT AND CONTENT OF NOTICE (§§ 121a.504–121a.505)

*Comment:* Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

*Response:* The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a)). The Office of Education agrees with commenters that there is no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

*Comment:* Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

*Response:* A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

### IMPARTIAL DUE PROCESS HEARING (§ 121a.506)

*Comment:* A commenter asked that the regulations specify that the public agency must pay for the hearing.

*Response:* The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

### IMPARTIAL HEARING OFFICER (§ 121a.507)

*Comment:* Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Commenters also asked that lists of hearing officers be required, including their qualifications.

*Response:* A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.506.

### HEARING RIGHTS (§ 121a.508)

*Comment:* Commenters disagreed as to whether hearing rights set forth in the proposed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

*Response:* The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

### HEARING DECISION; APPEAL (§ 121a.509)

*Comment:* A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

*Response:* No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

### ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

*Comment:* Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

*Response:* The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parties. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

### CIVIL ACTION (§ 121a.511)

*Comment:* Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

*Response:* No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

### TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEWS (§ 121a.512)

*Comment:* Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

*Response:* The section has been revised to set a 45 day time limit for a hearing and a 30 day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

### CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

*Comment:* Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

*Response:* A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

### SURROGATE PARENTS (§ 121a.514)

*Comment:* Commenters requested that the regulations clarify when surrogates may be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

*Response:* The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

*Comment:* Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

*Response:* No change has bee [illegible] ate procedures for the appointmen [illegible] tes will be followed. Disagreemen [illegible] the choice of surrogates may be the [illegible] of a due process hearing under section 121a.506.

*Comment:* A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

*Response:* No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

*Comment:* A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

*Response:* No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal government has no authority to limit legal liability.

*Comment:* A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

*Response:* The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

### PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530–121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, § 84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation; change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team * * * including at least one teacher or other specialist with knowledge in the area of identified disability * * *"

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development

of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

*Comment:* Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

*Response:* A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

*Comment:* Several commenters felt that timelines should be set for implementing the evaluation process (e.g., for initial referral to evaluation and placement).

*Response:* No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

*Comment:* Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

*Response:* This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340–121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

### LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children * * * are educated with nonhandicapped children * * *." The regulations for implementing this provision are set out in sections 121a.550–121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

#### GENERAL (§ 121a.550)

*Comment:* A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

*Response:* No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

#### CONTINUUM OF ALTERNATIVE PLACEMENTS (§ 121a.551)

*Comment:* Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94–142, that it implies best-to-worst, etc.). Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

*Response:* No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE," the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94–332, p. 9):

> The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

#### PLACEMENTS (§ 121a.552)

*Comment:* Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

*Response:* No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *" (45 CFR Part 84—Appendix, paragraph 24)

*Comment:* A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3–5 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

*Response:* No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

### CONFIDENTIALITY OF INFORMATION

#### NOTICE TO PARENTS (§ 121a.561)

*Comment:* Commenters asked that the detailed content of the notice requirements be deleted as excessive.

*Response:* No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

#### ACCESS RIGHTS (§ 121a.562)

*Comment:* Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

*Response:* Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 432(a)(1)(A)), to which these regulations are tied (by statute).

#### FEES (§ 121a.566)

*Comment:* A commenter felt the first copy of a record should be given free upon request from the parents.

*Response:* No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612

(3)(C)). Agencies may of course adopt policies of making copies available free of charge, and are encouraged to do so.

### HEARING PROCEDURES (§ 121a.570)

*Comment:* A commenter requested clarification of who conducts a hearing.

*Response:* The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

### CONSENT (§ 121a.571)

*Comment:* Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

*Response:* No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

### SAFEGUARDS (§ 121a.572)

*Comment:* A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

*Response:* The requirement has been modified to require a list of names and positions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

### DESTRUCTION OF INFORMATION (§ 121a.573)

*Comment:* A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existence of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

*Response:* The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly by stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

*Comment:* Commenters asked that notice be given to a child who has reached the age of majority.

*Response:* No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the postsecondary education level.

*Other Changes:* The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

## Office of Education Procedures

*General:* The requirements in these sections largely repeated the statute. Perhaps for this reason, few comments were received on the Office of Education procedures.

### WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.589)

*Comment:* A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

*Response:* A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

### WITHHOLDING PAYMENTS (§ 121a.590)

*Comment:* Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

*Response:* No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

## Subpart F—State Administration

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

## State Educational Agency Responsibilities

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.94) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

*Comment:* Commenters requested addition of a new section on State educational agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

*Response:* A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

### ALLOWABLE COSTS (§ 121a.621)

*Comment:* A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

*Response:* No change has been made on the State limit as it is a statutory limitation.

*Comment:* Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendaiton was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

*Response:* No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

## State Advisory Panel

### ESTABLISHMENT (§ 121a.650)

*Comment:* One commenter recommended that local panels be required.

*Response:* No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

### MEMBERSHIP (§ 121a.651)

*Comment:* A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advocacy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

*Response:* A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

### ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121a.652—121a.653)

*Comment:* Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

*Response:* A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

*Comment:* Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

*Response:* This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

## SUBPART G—ALLOCATIONS OF FUNDS; REPORTS

### ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

### REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121a.750–121a.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

### AMOUNT OF INFORMATION REQUIRED IN THE REPORT

*Comment:* Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

*Response:* Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information, to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retaining the categories in the States' annual reports. The various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

### WHO MAY BE COUNTED

*Comment:* Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argued that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

*Response:* Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid for solely by the Federal government, unless the child is in one of the age groups 3-5 or 18-21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by the Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the State for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

*Comment:* Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

*Response:* No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to make an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

### REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.708)

*Comment:* Commenters requested criteria be added for when funds may be reallocated.

*Response:* No criteria have been added as determinations will be made on a case-by-case basis.

## APPENDIX B—INDEX TO PART 121a

ADMINISTRATION

See: Monitoring.
Annual program plan requirements—§§ 121a.112; 121a.134; 121a.138; 121a.141; 121a.142; 121a.145.
Certification of State authority—§ 121a.112.
Direct Service by State educational agency—§ 121a.360.
Local application requirements—§§ 121a.228; 121a.236; 121a.240.
Local education agency definition—§ 121a.8.
State administration—Subpart F.

ADVISORY PANEL (STATE)

Annual program plan requirement—§ 121a.147.
General requirements—§§ 121a.650–121a.653.

ALLOCATIONS

Annual program plan condition of assistance—§ 121a.110.
Application by local agency condition of assistance—§ 121a.180.
Consolidated applications—§ 121a.191.
Count of children—See Reports.
Interior Department for Indian children—§ 121a.709.
Local agency allocation—See Reports.
  Formula—§§ 121a.705–121a.707.
  Reallocation—§ 121a.708.
  Use by the State—§ 121a.360.
Outlying areas—§ 121a.710.
Recovery for misclassified children—§ 121a.141.
State allocation:
  Formula—§§ 121a.701–121a.703; 121a.705–121a.706.
  Hold harmless—§ 121a.704.
  Use for administration—§§ 121a.620–121a.621.
Use of—See other headings.
Withholding—See: Hearings.
  From the local agency—§ 121a.194.
  From the State—§§ 121a.590–121a.593.

ANNUAL PROGRAM PLAN

Approval: disapproval—§ 121a.113.
Certifications—§ 121a.112.
Condition of assistance to State—§ 121a.110.
Contents—§§ 121a.111; 121a.112; 121a.120–121a.151.
Effective period—§ 121a.114.
General requirements—§§ 121a.110–121a.114.
Public participation—See: Public Participation.
Submission by State—§ 121a.110.

APPLICABILITY OF REGULATIONS—§ 121a.2

APPLICATION BY LOCAL AGENCY

Annual program plan requirement—§ 121a.144.
Approval or disapproval by State educational agency—§§ 121a.193; 121a.360.

Second priority children—amendment of application—§ 121a.324.
Submission by local agency—§ 121a.180.
Condition of assistance to local agency—§ 121a.180.
Consolidated application—§§ 121a.190–121a.192.
Content—§§ 121a.220–121a.240.
Excess costs—See: Excess Costs.
Public participation—See Public Participation.

AUDITS

See: Monitoring.

COMPLAINTS

State educational agency procedures—§ 121a.602.
See: Hearings.

COMPARABLE SERVICES

Local application requirement—§ 121a.231.

CONSENT

Defined—§ 121a.500.
Disclosure of information—§ 121a.571.
Initial placement—§ 121a.504(b).
Placement status during a proceeding—§ 121a.513.
Preplacement evaluation of child—§ 121a.504(b).

CONFIDENTIALITY OF INFORMATION

Annual program plan requirement—§ 121a.129.
Definitions—§ 121a.560.
General requirements—§§ 121a.560–121a.572.
Local application requirements—§ 121a.221.

CONSOLIDATED APPLICATIONS

See: Application of local agency.

COUNT OF CHILDREN

Annual report of children served—§§ 121a.750–121a.754.
Allocations:
  State entitlement—§§ 121a.701–121a.702.
  Local educational agency entitlement—§ 121a.707.
Outlying areas entitlements—§ 121a.710.

DEFINITIONS—§§ 121a.4–121a.15

DUE PROCESS

See: Confidentiality of Information.
  Evaluation.
  Hearings.
  Notice.
Procedures for parents and children—§§ 121a.500–121a.514.

EDUCATION

See: Free Appropriate Public Education.
  Full Educational Opportunity Goal.
  Individualized Education Program.
  Personnel Development.
  Physical Education.
  Special Education.
  Related Services.

EVALUATION

Advisory panel function—§ 121a.652.
Annual program plan requirements—§§ 121a.128; 121a.133; 121a.146.
Education programs—§ 121a.146.
Handicapped children:
  Consent required for—§ 121a.504.
  Defined—§ 121a 500.
  Hearings—See Hearings.
  Independent educational evaluation—§ 121a.503.
  Information on achievement—§ 121a232.
  Notice required—§§ 121a.504–121a.505.
  Protection—§§ 121a.129, 121a.133, 121a.221, 121a.530–121a.534.
  State responsibility—§ 121a.128.
Hearing aids—§ 121a.303.

Individualized education programs—§ 121a.146.
Personnel development—§ 121a.380.
Private school children service needs—§ 121a.453.
State educational agency activities—§§ 121a.146; 121a.601.
Training—See: Personnel development, this heading.

EXCESS COSTS

Generally—§§ 121a.182–121a.186.
Local application requirement—§ 121a.229.
Not applicable to State educational agency—§ 121a.360.

FREE APPROPRIATE PUBLIC EDUCATION

See: Individualized Education Programs.
  Related Services.
  Special Education.
  Time Limits and Timetables.
Annual program plan requirements—§§ 121a.121–121a.122.
Defined—§ 121a.4.
Generally—§§ 121a.300–121a.303; 121a.307.
Initiation or change—See: Notice.
State practice exception—§ 121a.300.
State use of local agency's allocation—§ 121a.360.
Priorities—§§ 121a.320–121a.324.

FULL EDUCATIONAL OPPORTUNITY GOAL

Annual program plan requirements—§§ 121a.123–121a.126.
General requirements—§§ 121a.304–121a.306.
Local application requirements—§§ 121a.222–121a.223.

HANDICAPPED CHILDREN

Defined—§ 121a.5.

Rights

See: Confidentiality of Information.
  Due Process.
  Evaluation.
  Free Appropriate Public Education.
  Hearing.
  Identification, Location, Evaluation.
  Individualized Education Program.
  Least Restrictive Environment.
  Notice.
  Private School Children.
  Special Education.
  Related Services.

HEARINGS

Disapproval of annual program plan—§ 121a.113.
Disapproval of local application—§ 121a.194.
Office of Education procedures—§§ 121a.580–121a.593.
Parents and children:
  Identification, evaluation, placement—§§ 121a.506–121a.514.
  Confidentiality of information—§§ 121a.568–121a.570.
Public hearings before adopting annual program plan—§§ 121a.280–121a.284.
Withholding payments from a State—§ 121a.590.

IDENTIFICATION, LOCATION, EVALUATION

See: Evaluations.
Annual program plan requirement—§ 121a.128.
Local application requirement—§ 121a.220.
Private school children—§ 121a.453.

INDIAN CHILDREN

Application from Secretary of Interior—§§ 121a.260–121a.263.
Count—§§ 121a.753.
Payments to Secretary of Interior—§ 121a.709.

INDIVIDUALIZED EDUCATION PROGRAM

Accountability—§ 121a.349.
Annual program plan requirement—§ 121a.130.
Content—§ 121a.346.
Defined—§ 121a.340.
Effective dates—§ 121a.342.
First priority children—§ 121a.322.
Free appropriate public education definition—§ 121a.4.
General requirements—§§ 121a.340–121a.349.
Least restrictive environment—§ 121a.552.
Local application requirement—§ 121a.235.
Meetings—§§ 121a.343–121a.345.
Parent participation—§ 121a.344.
Placement—§§ 121a.533; 121a.552.
Private school children—§§ 121a.347–121a.348; 121a.401.
Reevaluation—§ 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Annual program plan requirement—§ 121a.132.
General requirements—§§ 121a.550–121a.556.
Local application requirement—§ 121a.227.
Nature and location of State services—§ 121a.361.
Nonacademic services and settings—§§ 121a.306; 121a.553.
Physical education—§ 121a.307.
Placement decisions—§§ 121a.513; 121a.533.
Program options—§ 121a.305.

MATCHING—§ 121a.371

MONITORING

Annual program plan requirements—§§ 121a 128(b)(5); 121a.130(b)(2); 121a.135.
Auditing count of children served—§ 121a.754.
Confidentiality of information—§ 121.575.
Identification, location, evaluation—§ 121a.128(b)(5).
Individualized education programs—§ 121a.130(b)(2).
Least restrictive environment—§ 121a.556.
Private school children—§ 121a.402(a).
State educational agency responsibility—§ 121a.601.

NONDISCRIMINATION

Annual program requirement—§ 121a.150.
Evaluation materials and procedures—§ 121a.530.
Local application requirement—§ 121a.239.
Nonacademic services—§ 121a.306.
Private school children—§ 121a.456.
Program options—§ 121a.305.
Testing materials and procedures—§ 121a.530.

NOTICE

Confidentiality of information—§§ 121a.561, 121a.573.
Individualized education program meeting—§ 121a.345.
Intitiation or change of identification, evaluation, placement, or free appropriate public education—§§ 121a.504–121a.505.
Notice of opportunity for a hearing—See: Hearings.
Notice of procedural safeguards—§ 121a.505.
Public notice of withholding payments—§ 121a.592.

PERSONNEL DEVELOPMENT

Annual program plan requirement—§ 121a.139.
Comprehensive system of personnel development—§§ 121a.380–121a.387.
Included in State support services—§ 121a.370.
Least restrictive environment—§ 121a.555.
Local application requirement—§ 121a.224.
Personnel needs—§§ 121a.126; 121a.228.
Preservice training—§ 121a.321.

Trained personnel for evaluation materials—§ 121a.532.
Training regarding confidentiality of information—§ 121a.572.
Use of Part B funds for training—§§ 121a.321, 121a.322.

PHYSICAL EDUCATION

Included in special education—§ 121a.14.
Required—§ 121a.307.

PLACEMENTS

See: Evaluation.
Least Restrictive Environment
Private schools.

PRIORITIES

See: Evaluation.
Indentification, Location, Evaluation.
Annual program plan requirement—§ 121a.127.
Definitions:
First priority children—§ 121a.320(a).
Second priority children—§ 121a.320(b).
General requirements—§§ 121a.320–121a.324.
Local application requirement—§ 121a.226.
State direct and support services—§ 121a.370.

PRIVATE SCHOOL CHILDREN

Annual program plan requirement—§ 121a.140.
Confidentiality of information—§ 121a.560.
Cost of residential placement—§ 121a.302.
Handicapped children placed or referred by public agencies—§§ 121a.400–121a.403.
Handicapped children not placed or referred by public agencies—§§ 121a.450–121a.460.
Individualized education program—§§ 121a.347–121a.348.
Least restrictive environment—§ 121a.554.
Part B applicability to private schools—§ 121a.2.
Physical education—§ 121a.307.

PROCEDURAL SAFEGUARDS

See: Complaints.
Consent.
Hearings.
Notice.
Surrogate Parents.
Annual program plan requirements—§§ 121a.131; 121a.136.
Local application requirement—§ 121a.237.

PUBLIC PARTICIPATION

See: Hearings.
Annual program plan requirements—§§ 121a.120; 121a.137; 121a.280–121a.284.
Local application requirements—§§ 121a.226; 121a.234.
Secretary of Interior application—§ 121a.261.
State advisory panel—§§ 121a.650–121a.654.

RECORDS

See: Confidentiality of Information.
Annual program plan requirement—§ 121a.143.
Comparable services—§ 121a.231.
Count of children served—§ 121a.754.
Excess costs—§ 121a.183.
Individualized education programs—§ 121a.130.
Local application requirement—§ 121a.233.
Parents may examine—§ 121a.502; 121a.562.
Parents not participating in meetings—§ 121a.345.

RELATED SERVICES

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.13.

REPORTS

Annual report of children served—§§ 121a.750–121a.754.
Local application requirements—§§ 121a.232; 121a.233.
State advisory panel—§ 121a.652.

SPECIAL EDUCATION

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.14.

STATE ADVISORY PANEL

Annual program plan requirement—§ 121a.147.
General requirements—§§ 121a.650–121a.653.

STATE DIRECT AND SUPPORT SERVICES

Annual program plan requirement—§ 121a.51.
General requirements—§§ 121a.360–121a.372.

SUPPLANTING

Applicability to State educational agency—§ 121a.372.
Local application requirement—§ 121a.230.
Private schools—§ 121a.460.
Waiver of requirement—§ 121a.589.

SURROGATE PARENTS

Definition of parent—§ 121a.10.
Duty of public agency to assign—§ 121a.514.
Responsibilities—§ 121a.514.
Selection—§ 121a.514.

TESTING

See: Evaluation.

TIME LIMITS AND TIMETABLES

Annual program plan effective period—§ 121a.114.
Evaluation of educational programs—§ 121a.146.
Free appropriate public education—§§ 121a.122; 121a.300.
Full educational opportunity goal—§§ 121a.125; 121a.222.
Hearing decisions—§§ 121.512; 121a.583.
Individualized education programs—§§ 121a.342; 121a.343.
Public participation in the annual program plan—§ 121a.280–121a.284.
Reevaluation—§ 121a.534.
Report of children served—§ 121a.750–121a.754.
State monitoring of public agencies—§ 121a.601.
State review of hearing decision—§ 121a.512.

TRAINING

See: Personnel Development.

USE OF PART B FUNDS

Allocation formulas:
Consolidated applications—§§ 121a.190–121a.191.
Entitlements—§§ 121a.700–121a.710.
Annual program plan requirements—§§ 121a.148; 121a.149.
Department of the Interior (Indian children)—§ 121a.262.
Excess costs—§§ 121a.182–121a.186.
Local application requirement—§ 121a.238.
State and local educational agencies:
Free appropriate public education—§§ 121a.301–121a.302.
Full educational opportunity goal—§ 121a.304(b).
Priorities—§§ 121a.320–121a.324.
Private school children—§§ 121a.450–121a.460.
State educational agencies:
Allowable costs—§ 121a.621.
Federal funds for State administration—§ 121a.620.
Matching—§ 121a.371.
State advisory panel—§ 121a.652.
Use of local allocation for direct services—§§ 121a.360–121a.361.
Use of State educational agency allocation for direct and support services—§ 121a.370.
Supplanting—§§ 121a.230; 121a.372; 121a.580.
Training—See: Personnel Development.

5. A new Part 121m is added to read as follows:

## PART 121m—INCENTIVE GRANTS

Sec.
121m. 1 Scope; purpose.
121m. 2 General provisions regulations.
121m. 3 Eligibility.
121m. 4 Application.
121m. 5 Application contents.
121m. 6 Amount of grant.
121m. 7 Participation by children not counted under Part B of the Act.
121m. 8 Excess costs.
121m. 9 Administration.
121m. 10 Annual evaluation report.

AUTHORITY: Sec. 619 of Pub. L. 91–230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

### § 121m.1 Scope; purpose.

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.12 and § 121a.13 of this chapter.

(20 U.S.C. 1419(c).)

### § 121m.2 General provisions regulations.

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

### § 121m.3 Eligibility.

A State is eligible to receive a grant if:

(a) The Commissioner has approved its annual program plan under Part 121a of this chapter; and

(b) The State provides special education and related services to any handicapped children aged three, four, or five.

(20 U.S.C. 1419(a).)

### § 121m.4 Application.

To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(20 U.S.C. 1419(b).)

### § 121m.5 Application contents.

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.123 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefitted indirectly. If children are to be benefitted indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

### § 121m.6 Amount of grant.

(a) The amount of a grant is $300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.750–121a.754 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1410(a), (d).)

### § 121m.7 Allowable expenditures.

(a) The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.750–121a.754 of this chapter if the State educational agency insures that those children have all of the rights afforded under part 121a of this chapter.

(b) The State educational agency may use up to five percent of its grant for the costs of administering the funds provided under this part.

(20 U.S.C. 1410(c).)

*Comment.* In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where appropriate, to enable parents to work more effectively with their children; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

### § 121m.8 Excess costs.

(a) If local or State funds are available to pay for the education of nonhandicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children.

(b) If no local or State funds are available for nonhandicapped children of the same age, funds under this part may be used to pay for all of the costs directly attributable to the education of the handicapped children.

(20 U.S.C. 1419(c).)

### § 121m.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies, intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

### § 121m.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

(b) The report must contain:

(1) The results of the evaluation under § 121m.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three, four, and five.

(20 U.S.C. 1419(c).)

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# SECTION III

# SURROGATE PARENT

117

## THE PARENT SURROGATE: ONE APPROACH

> The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. (Principle 7, United Nations General Assembly Resolution, 1959)

Legal doctrines have developed in this country to protect the person and rights of the child. The legal status of minor is imposed on all children below an age varying from 18 to 21 in different states. This expresses an official, irrefutable presumption that persons so young are too immature physically, emotionally, intellectually, and socially to deal with their life situations themselves.

This concept is echoed in a second protective doctrine in American law which recognizes the legal disabilities imposed on a minor. This doctrine supplies a legal remedy in the form of a guardian of the person of the child. The guardian is vested with powers and duties to furnish the child responsible representation so that his personal rights can become functionally effective in his everyday life situations. Two major types of guardians are recognized by law: the natural guardian (the child's own parents or adoptive parents) and the legal guardian. Ideally, a legal guardian is appointed for a minor child whenever he is without proper guardianship from his parents. In this way the child's person and legal rights will be continuously in competent hands identified with his interests and welfare. A judicial process is used to provide a child with a legal guardian so that the exercise of authority and control by the legal guardian over the person and rights of the child will always be accountable at law (Weisman, 1973).

Public Law 93-380, the Education Amendments of 1974, contains many provisions and safeguards that attempt to make the rights expressed in the United Nation's Principle 7 a reality for all American children, including the handicapped. The specific due process procedures of Public Law 93-380 secure a child's right, through representation by his parents or guardian, to the opportunity for full participation in the total educational identification, evaluation, and placement process. The assumption is that the parents or guardians will be available and willing to participate in this decision making process, fully accepting the responsibility of representing the child's best interests.

There are, however, children who lack this kind of personal representation, protective legal doctrines notwithstanding. They are the children whose parents or guardians are unknown or unavailable, or children who are wards of the state. The rights of these children are not safeguarded if they are without an advocate to act for them. Recognizing this, Public Law 93-380 provides for the appointment of a "parent surrogate," i.e., an individual appointed to safeguard a child's rights in the specific instance of educational decision making -- identification, evaluation and placement.

the duties and responsibilities of guardianship in one individual. This, then, is a child in need of a surrogate.

Other children falling into the same legal gap are confined to institutions, detention homes, or other state facilities. They too lack a personal advocate. Frequently a state official becomes the guardian of such a child, but to conceptualize the quality of guardianship that can be exercised one must only take a look at a typical statute. In Michigan, for example, "the commissioner of revenue shall ex officio be the public guardian of every patient admitted to an institution until he is discharged therefrom" (Michigan Statutes, Title 14, Sec. 14.811(1)). Given this huge responsibility, one can only wonder how much time a state official can spend working for the rights of all the children under his jurisdiction. The parent surrogate concept found in Public Law 93-380 is intended to fill this gap for children, but in one specific instance only -- the educational decision making process. It extends the state's protective strategies role and assures that all children, including the handicapped, are guaranteed complete due process in educational decision making.

## MATCHING A CHILD WITH A SURROGATE

Under the procedures proposed here, when it is determined that a child is a potential candidate for special education services, the parents or guardian must be informed that an evaluation is being considered. School personnel or others involved in the education or treatment of children (e.g., an employee of a residential school or hospital, a physician, or a judicial officer) may feel that a particular child is in need of special education services. To begin the evaluation process, the local education agency, informed of the need, must secure written permission from the parents or guardian. If the permission is not forthcoming and there is reason to suspect that this is due to the unavailability of the parents or guardian, the local education agency must make written inquiry to the adult in charge of the child's place of residence, as well as to the parents or guardian at their last known address. If these efforts find that the child is without a parent or guardian, or if one of the persons initiating the request knows that they are unavailable, then a request for a surrogate will be filed with the child's local education agency (Form 10, Request for Assignment of a Surrogate Parent). Copies of the request should be sent to the state education agency and perhaps a state standing board or advisory committee on the handicapped.

After a local education agency receives a request for the assignment of a surrogate, it must in turn request the state education agency, through the chief state school officer or his designee, to determine if the child in question is in need of a surrogate. It is suggested that those nominated as hearing officers fill this role, but acting as impartial agents rather than in their capacity as hearing officers. In reaching a decision, all available information, such as the child's records, the documented evidence of attempts to contact the parents or guardian, and court records outlining previous legal action concerning the child's status, will be weighed. This study must take place within 30 days of the local agency's request, after which time notice of the decision will be sent to the local education agency, the state education agency, and the state board.

## CHILDREN IN NEED OF A SURROGATE

Although the law, through its doctrines of minority and guardianship, has evidenced a basic commitment to children, there remain many who have the protection of neither parent nor guardian with the legal capacity to represent them. This is frequently the case with a child whose parents die or are otherwise unable to provide a home for him. Often such a child will go to live with aunts or uncles or older siblings in an extended family situation where he in essence becomes a member of another household. In situations where families assume responsibility for one of their own, there may be no court appointed guardian, resulting in an informal arrangement that leaves the child without a formally declared legal representative.

When the extended family is not a practical alternative, an increasingly frequent situation as our society becomes more mobile and the nuclear family becomes physically and emotionally isolated, the state steps in with protective strategies and assumes what was once a family responsibility. The state may impose guardianship on a child or arrange for legal adoption, two options which could provide a legal representative for the child in the form of either one person or adoptive parents. The child's legal representative takes on all parental responsibilities. Other arrangements made by the state provide a home and services for a child but do not give one person legal guardianship status over him. This situation arises when the child is made a ward of the state.

A 1972 Massachusetts law sums up the prevailing attitude:

> It is hereby declared to be the policy of the commonwealth to assure every child a fair and full opportunity to reach his full potential by providing and encouraging services which strengthen family life and support families in their essential function of nurture for a child's physical, social, educational, moral, and spiritual development. Every child shall be entitled to the full protection of the commonwealth. In the absence or inability of parents to provide care and protection for their children, it shall be the responsibility of the commonwealth to assure substitute residential care and protection for every child. (Massachuestts Law, Chapter 785, 1972)

When a child becomes a ward of the state he is generally assigned to a particular state administrative agency. For example, a child whose parents are unable to provide a suitable home due to a temporary illness of one or both parents will be made a ward of the state social services department and placed in a foster home, with the long range intention that he will return to his parents' home when the current crisis has passed. The parents have relinquished custody for the interim, and although the foster parents provide a home and supervise the day to day life of the child, they are not his legal guardians. The child is in fact a ward of the social services department and his needs are attended to by the social worker and foster parents, both agents of the department. He is, however, without an independent advocate, for no court has vested

If the recommendation is that the child is in need of a surrogate, the state education agency must assign one to the child within 5 days after receiving notice. Once the assignment is made, the surrogate will be responsible for representing the child, just as the parents or guardian would, through the complete decision making process. The responsibilities extend to the appeals procedure as well, if that occurs, and to at least the first review of the placement. The rights of the child are respected throughout this entire process, and it is important to remember that the surrogate assignment is always contingent on the child's acceptance of him. The child reserves the right to request a change of surrogate at any step along the way.

## THE PARENT SURROGATE

The task of locating individuals to act as surrogates could be done by a state level standing board or advisory committee established to advise and work with the state as it delivers services to handicapped children. Members of this type of board are concerned with quality education and generally include parents, teachers, professionals involved with the education and treatment of children with special needs, and other community members who are interested in the education of handicapped children. Such a group has channels of communication open to local professional organizations concerned with the handicapped (Association for Retarded Citizens, for example) and to individuals such as parents of handicapped and nonhandicapped children, pediatricians, or attorneys sensitive to the needs of children. These are individuals who may be considered for selection as surrogates. It is recommended that any pool of surrogates not include state or local education employees. Because of their employment, they may be unable to act as impartially as desired. A surrogate must have the child's best interests constantly in mind, and if he is employed by a local or state system concerned with handicapped children, he is placed in the position of serving two masters.

Once the state board has identified persons it feels would be effective surrogates, it will send their names to the state education agency, which has the responsibility of assigning a surrogate to a specific child. Individuals should be located in all parts of the state so that every child will have easy access to his/her surrogate. The state agency should develop a training program, devise a system of compensation, determine the rules and regulations governing the employment of a surrogate, and develop plans to disseminate information about the program.

## TRAINING

A surrogate can be truly effective only if he is well informed of the special needs of handicapped children and the provisions the state has made for filling those needs. Elements of a training program should include at least the following:

1. The role and responsibilities of the surrogate.
2. The specific nature and needs of different types of handicapping conditions.

3. The state's policies regarding the education of exceptional children including case law, rulings of attorneys general, and special education statutes and regulations.
4. Existing programs.
5. Options to consider, such as special class placement, special tutors, regular class placement with modification, and alternatives to public school.
6. The procedures governing the operation of special education programs.

## COMPENSATION

There are many arguments concerning the value of volunteer surrogates as opposed to those who are paid for their services. However, there is support for the idea that in a decision as important as educational placement, a trained, paid surrogate is preferable to a volunteer. Some of the methods of payment for consideration by the state include:

- A flat rate for each assignment, much as a court appoints a lawyer for a specific case.

- Actual costs incurred in each case (time spent in meetings. travel, etc.).

- An annual salary scale, or some variation, regardless of the number of children appointed to one surrogate. In this case a limit would have to be placed on the number of assignments so that quality of representation would be insured.

## EMPLOYMENT

Of prime importance in any advocacy system is the commitment of the advocate to the individual he represents. He must act in his client's best interests and attempt to meet his client's needs. As mentioned earlier, there is some doubt that a surrogate who is a public employee involved with children can adequately represent a child in a proceeding that also involves a public question. Particularly important, then, would be adherence to review mechanisms that could monitor surrogates to insure that they are truly representing their clients. Perhaps this monitoring responsibility could be shared with the state board that originally selected the surrogates. This shared responsibility would lend an element of objectivity to a potentially partisan situation. What must always be of paramount concern to all involved is that the child's rights are protected and that he is receiving quality representation.

## DISSEMINATION

The state board charged with the responsibility of identifying parent surrogates should also be one of the mechanisms through which the program becomes visible. The board will have direct access to all types of persons interested and involved with handicapped children -- parents, teachers, professionals, professional groups, and more. These are the people who would either be interested in serving as surrogates or know of others who would be good possibilities. They might also be aware of children eligible for a surrogate.

The state's avenues to those who should be made aware of the program are many: the local education agencies, PTAs, teachers' groups, medical personnel, social services agencies, and others. A media campaign is most effective in reaching the general population and is an important part of implementing the whole concept. If the public at large is not familiar with the surrogate plan, all eligible children will not be adequately served.

The parent surrogate system described here puts the responsibility for the program squarely on the state. The means a state chooses to effect the surrogate plan are not the important thing. What is important is the surrogate concept itself -- a concept that can be extremely effective in insuring that all children are treated equally and are assured of the rights common to all, at least in the educational decision making process.

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CONNECTICUT STATE BOARD OF EDUCATION

Hartford

# CONNECTICUT'S SURROGATE PARENT PROGRAM

July 1976

## PART A

### SURROGATE PARENT LEGISLATIVE REPORT

as required by SA 75-49

Connecticut State Board of Education
Hartford

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Bureau of Pupil Personnel and Special Educational Services

# FOREWORD

This legislation report contains a design for implementing a surrogate parent program, in accordance with Section 614 of Public Law 93-380, the Education Amendments of 1974 to the Elementary and Secondary Act of 1965. This report was prepared with the assistance of a Task Force from the State Advisory Council on Special Education.

The State Board of Education extends its gratitude to the Task Force members for their efforts in developing the surrogate parent model.

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## Introduction

"With enactment by the U.S. Congress of the Education Amendments of 1974 (Public Law 93-380), all state education agencies, in order to remain eligible for federal funds for the education of handicapped children, were required to adopt a state plan that would include provision of adequate due process in educational decision making."[1.] One of the requirements of this due process is the provision by the state of "procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the state including the assignment of an individual (not to be an employee of the state or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians,"..[2.] Compliance with this law is a necessary condition for eligibility to receive federal funds for education of the handicapped.*

In the 1975 session of the Connecticut General Assembly a special act (SA75-49) was passed mandating a study by the State Board of Education, in cooperation with other state agencies charged with providing services, programs, care or supervision to children in need of special education, of a "means of implementing a surrogate parent program, in accordance with section 614 of Public Law 93-380, The Education Amendments of 1974 to the Elementary and Secondary Act of 1965."[3.] Section 3 of SA75-49 requires that the State Board of Education shall, "on or before February 15, 1976, present a report of its findings to the general assembly and recommend to the general assembly specific statutory changes necessary to implement any such finding."[4.]

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1. A Primer on Due Process, Education Decisions for Handicapped Children, The Council of Exceptional Children, p.vii.
2. Public Law 93-380, Sec. 612 (d) (13) (iii), p.99.
3. Special Act 75-49, Section 1, see Appendix A.
4. Ibid., section 3.

* See also Sec. 4-28, Connecticut General Statutes, I,260.

The State Board of Education through the Advisory Council on Special Education appointed a Surrogate Parent Task Force to prepare the study and report. The Task Force was composed of members of the State Advisory Council on Special Education, the Deparment of Children and Youth Services, the Legal Aid Society of Hartford County and staff of the Bureau of Pupil Personnel and Special Educational Services of the State Department of Education.

In order to develop this report the Task Force held twenty-three discussion meetings, developed an amendment to the State Plan for Special Education Under Part B, Education of the Handicapped Act, As Amended by PL 93-380, authorized a computer search of the general statutes of Connecticut to ascertain the amendments needed to implement a surrogate parent program and consulted with representatives of the Department of Mental Retardation, the Board of Education and Services for the Blind, and of the Department of Corrections. Recommended statutory changes may be found at the end of this report.

## Connecticut's Problem:

Although it is not possible to obtain precise figures delimiting the need for surrogate parents, many of Connecticut's children are wards of the state or their parents are unknown or unavailable. A significant percentage of these children are handicapped children and are, therefore, entitled to the protection of a surrogate parent appointed by the state to act as an advocate in the educational decision-making process.

## Definitions:

1. "'Child' means any person under twenty-one years of age."[5]

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[5] General Statutes, Conn. Rev. to 1975, Section 10-76a(b), II, 434.

2. The term "handicapped children" for the purpose of this report means children requiring special education as defined in Section 10-76a(e)(1) of the general statutes of Connecticut and "includes any exceptional child who (1) is mentally retarded, physically handicapped, socially and emotionally maladjusted, neurologically impaired, or suffering an identifiable learning disability which impedes his rate of development, which disability is amenable to correction or which rate of development may be improved by special education,..."[6.]

3. The 'surrogate parent' is "an individual appointed to safeguard a child's rights in the specific instance of educational decision-making..."[7.]

4. The 'educational decision-making process' includes "identification, evaluation, and placement,"[8.] as well as the hearing, mediation, and appeal procedures in the general statutes.[9.]

5. "Unknown" means "not known and can't be ascertained by reasonable diligence or after reasonable inquiry."[10.]

6. "Unavailable" means not present after "good faith effort to obtain his presence..."[10.]

7. "Agency" means the local education agency or any state agency responsible for the child.

Surrogate Parents:

1. Qualifications: A person assigned as a surrogate parent
   - shall be an adult.
   - shall not be an employee of the state or of a

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6. Ibid., Section 10-76a(e)(1)
7. A Primer, op.cit., p.38.
8. Ibid.
9. Gen.Stat., op.cit., Section 10-76, et seq, as amended by PA75-94, 75-255, p.438, 493, 521, and 587.
10. 43, Words and Phrases, unavailable, unknown

local educational agency involved in the education or care of children.

- shall have no other vested interest that will conflict with the primary allegiance to the assigned child.
- shall be knowledgeable about the educational system, special education laws, and the legal rights of the child in relation to the system.
- shall be reasonably well acquainted with the cultural and language background of the child.

2. Training: A person assigned as a surrogate parent
   - shall receive appropriate training concerning the nature and needs of different types of handicapping conditions, available programs and options, responsibilities and limitations of the surrogate parent, and the sources of assistance available to the surrogate parent, with special emphasis on the duties and responsibilities of the surrogate parent in relation to the child's records and on the need to seek competent legal assistance in implementing hearing and appeal procedures.
3. Appointment: A person assigned as a surrogate parent
   - shall be selected from a pool of qualified persons by the Secretary of the State Board of Education or his designee. In appointments, consideration

shall be given to the cultural and language background of the child. (See also Procedures hereinafter.)

4. Responsibilities: A person assigned as a surrogate parent

- shall represent the handicapped child in all educational decision-making processes concerning that child by:

  (a) becoming thoroughly acquainted with the child's history and other information contained in school and other pertinent files, records, and reports relating to that child's educational needs,

  (b) complying with state and federal law as to the confidentiality of all records and information pertaining to that child to which he/she is privy,

  (c) using discretion in necessary sharing of information with appropriate people for the purpose of furthering the interests of the child,

  (d) becoming familiar with the educational prescription for the child and by giving his/her approval,

  (e) reviewing and evaluating special education programs pertaining to the child and such other programs as may be available,

  (f) initiating the mediation, hearing, and/or appeal procedures and seeking qualified legal assistance when such assistance is in the best interest of the child.

5. Protections: A person assigned as a surrogate parent

- shall be held harmless by the state when acting in his official capacity except for acts or omissions which are found to have been wanton, reckless or malicious.[11]

- shall not be considered a member of the "public" for purposes of Section 10-209, General Statutes of Connecticut, Revised to 1975.
- shall have the same protections and immunities in professional communications as those provided teachers and nurses in Section 10-154a, General Statutes of Connecticut, Revised to 1975.
- shall be reimbursed by the State Board of Education for all reasonable and necssary expenses incurred in pursuit of duties, the amount and form of such reimbursement to be determined by regulation.

Procedures:

The Agency responsible for providing special education for the child receives request:

Any person who knows of a child who may need special education services and also knows or believes that a child's parents or guardians are not known, are unavailable, or that a child is a ward of the state, may submit a written request to the Agency for the assignment of a surrogate parent to the child. A copy of the request should be sent to the State Advisory Council on Special Education or the State Board of Education and directed to the appropriate officer in charge of the surrogate parent program.

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[11] General Statutes Conn. Section 10-235(b), II, 540.

Agency Investigates:

It will be the responsibility of the Agency to determine whether or not the parents or guardians of the child are not known, are unavailable, or the child is a ward of the state. Such determination shall be made within ten (10) days following the submission of a request for the assignment of a surrogate and written notice of the result of such determination shall be forwarded to the SEA, the State Advisory Council, and to the person who filed the request.

Unable to Locate Parent:

If the parents or guardians are found to be available, the request is dropped and notice of such disposition of the case is sent to the person who filed the request.

Agency Requests State Education Agency to Determine if There is Need For Surrogate:

If no parent or guardian is found, the Agency will request the SEA to review the case and determine whether or not there is need for a surrogate parent for the child.

State School Officer or Designee is Assigned:

A member of the State Department of Education staff designated by the secretary of the State Board of Education and specially trained for the assignment shall be delegated the responsibility for the case.

Officer Weighs Evidence:

The designated officer shall review the pertinent records and shall consult with the person who filed the request.

Officer Decides and Informs State Education Agency, "Agency", and State Advisory Council on Special Education:

The designated officer, having found that the status of the child meets the criteria for the assignment of a surrogate parent, shall request the Advisory Council on Special Education to appoint a surrogate

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parent to the child. The review and appointment procedure must be completed within thirty (30) days of his designation or within forty-five (45) days of the intitial request for a surrogate parent.

The recommendation for appointment of a surrogate parent along with all necessary supporting documents shall be submitted to the Juvenile Court for the official appointment of the surrogate parent by the court.

If the child is found not in need of a surrogate parent, the process will stop there and notification of such finding will be sent to the Agency, State Advisory Council, and to the person who filed the request.

The educational placement of the child shall not be changed during the above process nor prior to the participation of an assigned surrogate parent in the educational decision-making process.

| Cumulative Time | Maximum Time for Each Step | PROCEDURE |
|---|---|---|
| 10 days | 10 days | NOMINATION OF A CHILD -- WRITTEN REQUEST TO AGENCY<br>AGENCY RECEIVES REQUEST -- SEND COPIES TO SEA, STATE ADVISORY COUNCIL AND APPROPRIATE OFFICER<br>AGENCY INVESTIGATES<br>UNABLE TO LOCATE PARENT --- PARENT LOCATED, REQUEST IS TERMINATED |
| 40 days | 30 days | AGENCY REQUESTS SEA TO REVIEW THE CASE<br>EVIDENCE IS WEIGHED -- IF CHILD MEETS THE CRITERIA |
| 45 days | 5 days | SURROGATE PARENT ASSIGNED (RECOMMENDATION)<br>APPOINTMENT REQUESTED FROM JUVENILE COURT |
| 90 days | 45 days | SURROGATE PARENT APPOINTED BY JUVENILE COURT |

## PART B

STATE OF CONNECTICUT

P.A. 76-429

AN ACT CONCERNING SURROGATE PARENTS

# STATE OF CONNECTICUT

## P.A. 76-429

## AN ACT CONCERNING SURROGATE PARENTS

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) As used in this act: (1) "Surrogate parent" shall mean the person appointed by a juvenile court, upon the recommendation of the secretary of the state board of education, as a child's advocate in the educational decision-making process in place of the child's natural parents or guardian; (2) "the educational decision-making process" shall include the identification, evaluation, placement, hearing, mediation and appeal procedures provided for in chapter 164 of the general statutes; (3) "unavailable" shall include, but not be limited to, a parent or guardian who is committed to a mental institution, incarcerated or otherwise unable to act as the child's advocate in the educational decision-making process.

Sec. 2. (NEW) (a) When in the opinion of the secretary of the state board of education or his designee, a child, as defined in section 10-76a of the general statutes, as amended by section 60 of public act 75-567, may require special education and the parent or guardian of such child is unknown or unavailable or such child is a ward of the state, the secretary or his designee may petition the juvenile court in the district wherein such child resides for the appointment of a surrogate parent who shall represent such child in the educational decision-making process. The petition to the juvenile court shall be verified and shall include the child's name, date of birth, sex and residence, a statement explaining why the child meets the criteria for the appointment of a surrogate

141

parent and the name of a proposed surrogate parent who is qualified to represent the child in the educational decision-making process.

(b) Upon the filing of a verified petition for the appointment of a surrogate parent, pursuant to subsection (a) of this section, the juvenile court shall cause a summons to be issued requiring the parents or parent or guardian of such child to appear in court for a hearing at the time and place named, which summons shall be served not less than seven days prior to the date of such hearing in the manner prescribed by section 17-61 of the general statutes, and said court shall further give notice, not less than seven days prior to such hearing date, to the petitioner of the time and place the petition is to be heard. The cost of service of any such summons and any costs incurred in the giving of such notice shall be paid by the state board of education.

Sec. 3. (NEW) Upon a finding by the juvenile court that the child on whose behalf a petition was filed pursuant to section 2 of this act meets the criteria for the appointment of a surrogate parent, such court shall appoint a surrogate parent for such child who shall be the proposed surrogate parent named in the petition or, if the court determines that such proposed person shall not be the surrogate parent, another person recommended by the secretary of the state board of education, upon the request of the court to make another recommendation, and agreed upon by the court. Such appointment shall be effective until the child reaches eighteen years of age, provided the secretary of the state board of education, not less than thirty days prior to the child's eighteenth birthday, may petition the court for an extension of the original order until the child graduates from high school or reaches the age of twenty-one years, whichever occurs first, and further provided that the secretary may petition the juvenile court at any time for the replacement of the surrogate parent. Upon the filing of any such petition, the court shall cause a summons to be issued requiring the child and surrogate parent to appear in court at the time and place named, which summons shall be served not less than seven days prior to the date of the hearing in the manner prescribed by section 17-61 of the general statutes, and said court shall further give notice, not less than seven days prior to such hearing date, to the petitioner of the time and place when the petition is to be heard. The cost of service of any such summons and any costs incurred in the giving of such notice shall be paid by the state board of education. If the surrogate parent resigns or dies or for any other reason is unable to continue as surrogate parent for the child, the secretary of the state board of education shall, if he deems the appointment of a successor surrogate necessary, petition the court in the same manner as provided in subsection (a) of section 2 of this act and the court shall give notice to the parent, parents or guardian in the same manner as provided in subsection (b) of section 2 of this act.

Sec. 4. (NEW) The surrogate parent of any child appointed pursuant to section 3 of this act shall have the same right of access as the natural parents or guardian to all records concerning the child, including, but not limited to, educational,medical, psychological and welfare records. No surrogate parent appointed pursuant to the provisions of said section 3 shall be liable to the child entrusted to him or the parents or guardian of such child for any civil damages which result from acts or omissions of such surrogate parent which constitute ordinary negligence. This immunity shall not apply to acts or omissions constituting gross, wilful or wanton negligence.

Sec. 5. (NEW) The secretary of the state board of education shall promulgate regulations establishing qualifications and training procedures necessary for any surrogate parent appointed pursuant to section 3 of this act. The state advisory council on special education shall monitor the administration of the provisions of this act.

Sec. 6 This act shall take effect from its passage.

STATEMENT OF PURPOSE: To meet federal requirements pursuant to P.L. 93-380 and to protect the educational rights of children requiring special education by providing for the appointment of a surrogate parent for any such child whose parent or guardian is unavailable or any such child who is a ward of the state.

# PART D

## A MODEL FORMAT FOR SCREENING AND SELECTION OF SURROGATE PARENTS

# A MODEL FORMAT FOR SCREENING AND SELECTION OF SURROGATE PARENTS

Appoint a Coordinator of Surrogate Parents whose responsibilities will include the following:

1. Develop a printed description of surrogate parents; (Document should be given in response to initial contacts and inquiries);

2. Develop and distribute to interested persons a formal application;

3. Consider all applications;

4. Conduct screening interviews in conjunction with a standing committee comprised of representatives from the State Advisory Council on Special Education and bureau consultants. (Should be a structured period of time and the candidate should be allowed to talk about himself and tell why he wants to be a surrogate parent. This interview should not be of a counseling or psychiatric nature, but should allow the candidate to be free to see if he wants to be a surrogate parent and the committee to develop hunches as to whether he should be);

5. Forward a letter of nomination based upon a review of the application and interview session, approximately one week after the interview. (In cases of rejection, it is additionally helpful to discuss the situation personally with the idea of rechanneling the candidate's abilities in another direction);

6. Develop and conduct orientation and training sessions for accepted applicants. (The training sessions should provide an opportunity for learning about potential proteges* and what a surrogate parent does. For an example, where a protege is suspected LD, such study titles could include an introduction to LD; normalization and risk with LD; the advocate/protege relationship; etc.). A good training period should include at least four (4) sessions;

7. Letter of appointment as surrogate parent.

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*The handicapped child in an advocacy relationship is a "protege".

# STRUCTURED INTERVIEW SHEET FOR SURROGATE PARENT

1. Why do you wish to become a surrogate parent?

2. When you hear the words "special education" mentioned, what do you think of?

3. Do you feel that today's society accepts the exceptional child?

4. Briefly describe what surrogate parent means to you. (One short paragraph is sufficient).

5. Do you feel that society at times fails to recognize the needs of those individuals not as fortunate as yourself? (If so, what do you feel that you as a concerned citizen can do to help?)

6. How long have you lived in the community?

7. How much time will you have to devote to responsibilities as a surrogate parent?

8. It is important to have some basic knowledge of your protege's condition. Opportunity will be given for you to increase your knowledge. Which of the following would you participate in?

   (a) Individual study

   (b) Session(s) of group training

# APPLICATION FOR SURROGATE PARENT

Name: ______________________ Date of Birth: ____________

Address: ______________________ Home Telephone: ____________

Marital Status: ______________________

Number of Children: Boys ____________ Girls ____________

Previous experience with children or youth: ______________________

______________________

______________________

______________________

______________________

Occupation: ______________________

Religious preference: ______________________
(Optional)

Special interests or activities

1. ______________________ 3. ______________________
2. ______________________ 4. ______________________

List the state or local organizations, committees, etc., in which you participate:

1. ______________________ 3. ______________________
2. ______________________ 4. ______________________

List three references:

| | Name | Title | Address |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |

## SECTION IV

## EXCEPTIONAL CHILDREN AND EDUCATIONAL PROGRAMMING

# CHILDREN'S RIGHTS, NORMALIZATION, AND ORGANIZATIONAL PATTERNS OF INSTITUTIONS

Richard Merges
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## Introduction

As I read through the sociological overview presented in the lead article by Calkins, Lukenbill, and Mateer, the purist in me was offended by the notion of the relativity of children's rights. "Not so," the purist cried, "Look at the Constitution....the Bill of Rights....concepts in religion of natural law." I began to formulate a rebuttal to the theory of relative rights -- then two incidents from my own past stopped me cold.

The first incident took place in a classroom setting at the State University of New York at Albany. We were discussing the problems of developing nations and I inquired as to how they dealt with mental retardation. That, I was told by a man who was notably humane in every other respect, was a luxury item.

The second incident was more intensely personal. I was assigned for two months as a consultant to a large metropolitan institution for the mentally retarded. It was the perfect stereotype of such a place: huge, overcrowded, poorly staffed, badly run, and in every way the perfect setting for the human despair that existed there. One day, after considerable effort at improving a particular area, I pointed out in consternation to a black staff member a small group of especially neglected retarded men and snapped, "Would you let your kids live like that?" She replied, "Mister, my kids do live like that."

Rights, alas, are relative.

As a background for discussing the rights of children, it seems necessary to place the concept of rights in a historical perspective and to bring into focus both the value of and dangers inherent in our present break with history. Later, I shall propose a specific right of children -- normalization -- and present my estimate of the effects of various organizational structures on this right. The emphasis in this discussion will rely heavily upon my experience with institutions for the mentally retarded.

## The Lesson of History

We should not delude ourselves as to the historical origins of the concept of rights. The rights of the Roman citizen, the divine rights of kings, the Magna Carta, John Locke's thesis on private property, and even the Constitution of the United States have a basic similarity: all were efforts to legitimize and to perpetuate a situation in which power was held primarily by those who were developing and specifying the concept of rights. Whether conquerors or kings, barrons or landowners, or successful revolutionaries, the overriding concern was preservation of power. The human implications of the exercise of such rights were often tragic; one can call to mind numerous examples of injustice being perpetrated on those excluded from the protection of the law.

Only occasionally in history, and then only briefly, have the rights of those not in power been upheld: unmolested passage of those on pilgrimage, for example, or exemption of serfs from combat. Even the present struggles for the rights of blacks, women, and others, have been largely fruitless until power bases have been formed, allowing the groups to articulate their demands and to take necessary action.

## The Plight of Children

Against this background, then, let us consider the special plight of children, with emphasis on my own field: mentally retarded persons. Any effort to establish rights for children must consider a number of factors:

1. Children, except for a few categories, such as the mentally regarded, are only temporarily without power. They can persevere until they can domineer their own children.

2. Children are almost completely dependent upon adults for the information which they must have to pass judgment upon their situation. If a child is beaten, for example, and has no other information to convince him another way of life is more just, he will almost invariably reach the conclusion "that's the way it is," and wait for conflicting information to change his opinion. He may instinctively dislike it (that is, after all, why it is done),but he won't rebel against it, especially in the early years.

3. Many children are accorded an informal type of rights by parents who truly love and care for them. For such children, a rigid system of formal rights could seriously impede the interpersonal relationships upon which their informal rights have been based. In my opinion, the situation of unstructured relationships is the one which should be nurtured and reinforced by our society, with a limited number of absolute constraints reserved for parents who are guilty of extreme violations of common sense in rearing their children.

4. For any of a number of reasons, some children are reared, not by parents in an informal family setting, but in an organized, structured setting usually designed for large-scale, efficient maintenance of physical well-being. These children have had, until recently, no means of articulating their needs before society at large. Most were placed in institutions situated, designed, and staffed to insulate society from the effects, and even the knowledge, of their presence. Progress for one of

> these children (who grow into adulthood, yet retain the social status of children) is usually the result of the fortunate juxtaposition of an individual child to an individual staff member, rather than the result of an organized, specified program of services. Talk with any child in these institutions; he will almost invariably attribute any progress made to the concerned interest of a person special to him rather than to a program. (Yet these children do have the concept of what a program is.)

This background and these reservations are presented, not to discourage those who speak for children's rights, but to make us all aware of the sociopolitical realities of the struggle for these rights. Should we succeed, we may well have entered upon a time when the theory of rights is able to function as it should: regardless of the power or articulation of a group, they will be assured of equitable treatment. It is a monumental task to "flip over" the evolutionary process of history which places accession to power before attainnment of rights, but it is one from which no man who works with those denied equal status can separate himself.

## Normalization as the Goal

In my opinion, the most unique right of the mentally retarded person (as distinguished from the rights of other persons) which must be explicitly assured is that of normalization. I am defining normalization in this context as living in a manner as like as possible to that in which the other members of society live. This single concept embodies the social and economic, as well as the moral and political, obligations which our society owes the mentally retarded. The concept of normalization is the objective by which any program for the mentally retarded should be evaluated.

This is a far-removed position from former attitudes toward the retarded which considered them as being something less than full persons. Normalization takes us beyond the minimal health and safety standards we previously set up for these nonpersons. Indeed, it declares them a part of society with a right to share in society's advantages.

## Institution versus Normalization

As an organizational theorist and an organizational behaviorist, I should like, then, to analyze the problems inherent in normalization in an institutional setting. Before beginning, one precaution is advisable. There are many in the field today who say that institutions, by definition, are incapable of providing humane, normal living conditions. They can and do point to innumerable examples of the dehumanizing living conditions which exist in many institutions for the mentally retarded. I certainly must accept what my senses have presented to me concerning these conditions. Nevertheless, I have seen institutional settings in which I would be comfortable placing my own child, as well as those in which I would not place any living creature, plants included. What I object to is the idea that such is the nature of institutions by definition. Rather, I subscribe to the theory that any organization, any man-made structure, any social entity, no matter how repressive, can be changed by men and women willing to overcome such formal obstacles with the same simple, human attention that has made so many Americans' experiences in the armed forces rich, rather than sterile, and human, rather than mechanistic. If such were not the case, then I would agree to the by-definition hypothesis, which, it seems to me, implies that nc normally sensitive human being could work in an institutional setting and emerge still normal. Structure may have a strong negative impact, but the right people can neutralize that impact.

The point of my digression is this: My analysis will tend to be made in absolute terms, for that is the nature of much of our language. However, what I am attempting to convey could be better described in terms of statistical probabilities, rather than absolute certainities, for I have often witnessed the unpredictable and admirable human trait of rising to an occasion and completely overcoming the expected effects of an undesirable environment.

## The Effects of Structure

If we were to describe the effects of structure upon the options available for humans to make normal choices, we would find that the range of choices decreases as the rigidity of structure increases. For example, if I feel like eating late tonight, I will call my wife and tell her that I'd like to do so; she'll either feed the kids early and me when I get home, or I'll get something to eat on the way. If I lived in an institution, however, the food would be prepared and served en masse. My range of options under such conditions would be relatively simple: eat, or sit in the dining room and watch the others eat. Certainly with resources other than those typically available, I might go to bed instead, cook my food on a range, or get a staff member to take me out for a hamburger, but esentially my choice in most situations would narrow down to food or no food. And so it goes with so many things: getting up in the morning or doing without breakfast; taking my medicine or receiving an injection; going to activities (usually no choice); going to bed at the prescribed hour or risking oversleeping and missing breakfast. Some of these problems are related to shortage of staff and overage of clients. Others are related to selfserving on the part of the staff. Many, however, relate to the complexity of the structure of the organization. A flexibility of just two hours in the time breakfast is to be served, for instance, would require many more cooks, stoves, and utensils. A whole new range of reporting times, cooking start-up times, and clean-up and preparation times would be needed. If a range of food were offered, more freezer and refrigerator space would be needed, much more complex dietary and inventory records would have to be maintained, and additional cleaning materials and a greater variety of food products purchased (all requiring more shelving, refrigerator and freezer space, and possibly more staff in the storehouse). All this just because I want fried eggs and bacon, rather than scrambled eggs and sausage.

Figure 1 illustrates this problem graphically: as the degree of structure increases, the choice of individual options decreases.

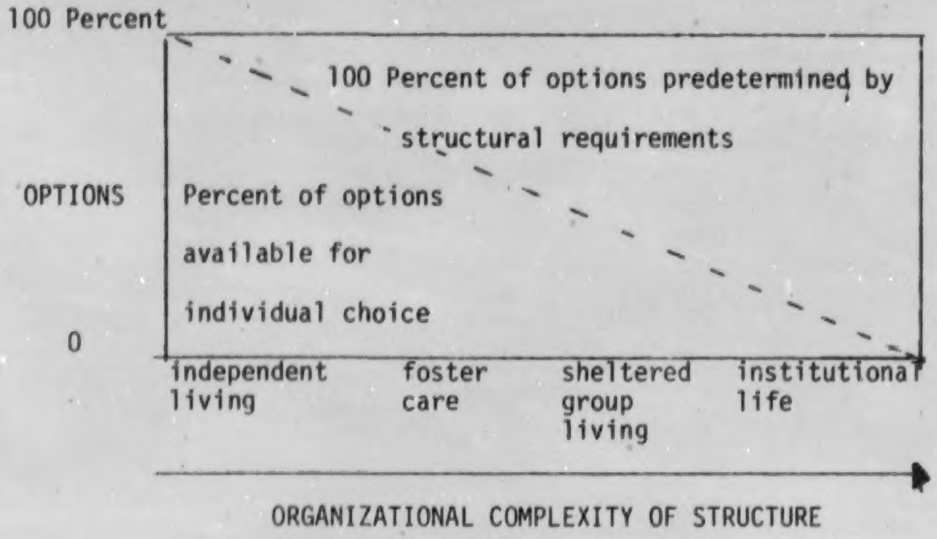
100 Percent
100 Percent of options predetermined by structural requirements
OPTIONS
Percent of options available for individual choice
0
independent living
foster care
sheltered group living
institutional life
ORGANIZATIONAL COMPLEXITY OF STRUCTURE

Figure 1.

Two additional complications for institutional management arise from this problem:

1. It is convenient to "play it safe" and to overstructure. Public institutions are accountable to the public, to the legislature, as well as to the parents and guardians of the residents. This is as it should be. However, such accountability often breeds bureaucratic timidity, where no risk is acceptable. I have seen whole buildings of institutions, for example, eating ground or pureed "mush" because of the possibility that a resident might choke.

2. Similarly, despite the fact that an individual should have only that degree of structure which is necessary for him to survive and to foster his development, we constantly find examples of overestimated survival and developmental requirements. For example, when Johnny was admitted at age five he couldn't talk. Today at age eight, Johnny has the capacity to talk, but everyone is used to the fact that initially he couldn't talk and therefore continues to do his speaking for him. His requirements for survival have diminished, but his options remain constant.

## Organizational Obsolescence versus Normalization

In working with many different organizations, not just institutions, the relationship illustrated in Figure 2 soon becomes apparent: the energy consumed in meeting the objective of the organization decreases, while at the same time the energy devoted to maintaining the organization increases. I've seen old institutions whose staff had gradually phased down the level of care for residents and whose efforts were more and more channelled to interrelations between staff members. I've seen several new institutions which were originally highly resident oriented and I've watched them age. Although varying in degree of rapidity, the process of deterioration is the same.

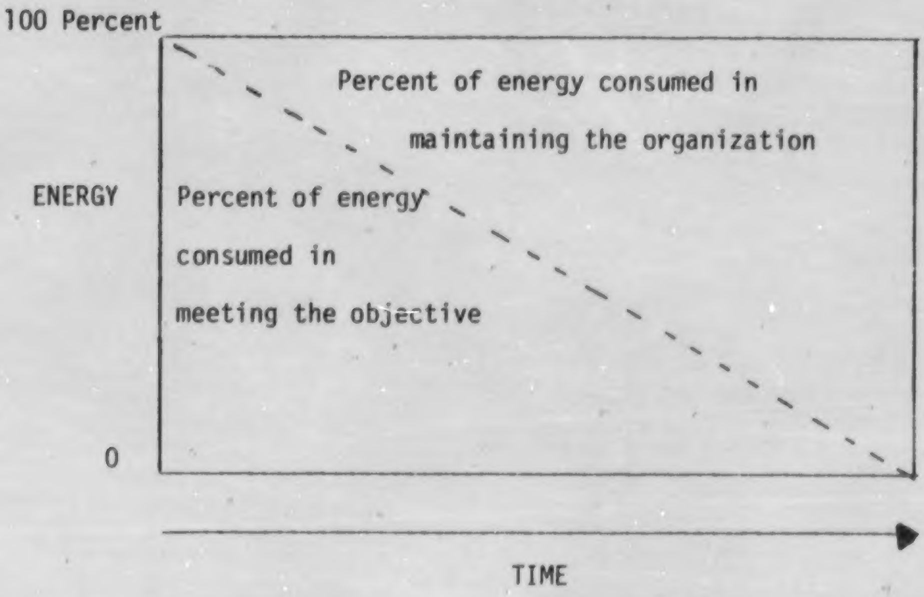
100 Percent
Percent of energy consumed in maintaining the organization
ENERGY
Percent of energy consumed in meeting the objective
0
TIME

Figure 2.

This aging process is not solely a characteristic of institutions; I've never seen an organization which didn't experience the same process, whether it be a business, an army, or a church. A number of prominent organizational theorists touches upon this phenomenon (referred to as entrophy) and seems to find it universal.

Many organizations experiment, consciously or not, with solutions to this problem by frequent changes in top jobs, reorganizations, resource reallocations, and the like. Many such changes can infuse new life into an institution for a period of time, but eventually the process of entrophy repeats itself.

## A Proposed Solution

A proposed solution proceeds logically from the analysis: de-structure and de-organize. For institutions the implications are as follows:

1. Normalize residents by removing them from the institution, keeping only those few for whom institutional care is essential for their survival.
2. For those persons for whom mental retardation is a primary source of maladjustment, provide a structured environment to modify acute antisocial behavior. Place a limit of about six months on any individual's stay in such a program.

For community agencies the implications are as follows:

1. Don't get big, don't overstructure, and don't overorganize. An agency is too big, in my opinion, if every staff member

doesn't know every client intimately enough to explain everything that is being attempted to be done for the client and why.

2. Have someone personally responsible to follow each client, so that he can't get lost and so that he will always have an advocate.

Ralph Nader is currently publishing a study of Community Mental Health Centers which criticizes their tendency to become bureaucratic empires designed to satisfy the aspirations of staff members. If only such a study had been available and acted upon when we were piling our resources into institutions!

## Introducing Free Enterprise into Human Service Systems

Community Mental Health Centers, in my opinion, are already overorganized in our large urban areas. We would profit far more from a truly localized individualized system along the following lines:

When Johnny's parents suspect a problem, they refer him to an agency with no generic/disability designation whatsoever. Johnny is assigned to a manager, who is to act as his broker in obtaining services. The manager is assigned perhaps ten or fifteen cases and carries each of them until follow-up is no longer needed. The manager obtains whatever diagnostic information is necessary, consulting with all who have valuable input. At no time is Johnny labeled autistic, retarded, or delinquent -- he remains just Johnny. Working with Johnny and his parents, the manager recognizes, for example, difficulties in gross motor coordination and arranges for the consultant services of an occupational therapist. Also discovering difficulties in the area of speech development, the manager arranges for the services of a speech therapy consultant. Schooling of an appropriate type is also provided by this same manager. The manager also has the responsibility for continually evaluating Johnny's progress, requesting changes or terminating treatment when necessary. In this service delivery system, all therapy personnel, as well as group school, group homes, and institutions, compete with one another to provide the best services for Johnny, which are both evaluated and paid for on a charge-back basis, by the manager.

The right to normalization probably will not be met in our present institutions, but I fear equally for the spate of community-based empires which are to follow. What I recommend is a free enterprise system for the human services. An advance on the part of our private economy has allowed proportionately greater advance than the advances for human services. Perhaps it's time to put this system more directly to work for human beings and the rights which they possess.

# MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION

H. J. Grossman, Editor

AAMD/Special Publication No. 2

# DEFINITION

The definition of mental retardation in this manual is slightly changed to reflect the deletion of the Borderline category. The definition used for the current manual is:

> Mental Retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.

MENTAL RETARDATION as defined, denotes a level of behavioral performance without reference to etiology. Thus, it does not distinguish between retardation associated with psychosocial or polygenic influences and retardation associated with biological deficit. Mental retardation is descriptive of current behavior and does not imply prognosis. Prognosis is related more to such factors as associated conditions, motivation, treatment and training opportunities than to mental retardation itself.

INTELLECTUAL FUNCTIONING may be assessed by one or more of the standardized tests developed for that purpose; SIGNIFICANTLY SUBAVERAGE refers to performance which is two or more standard deviations from the mean or average of the tests. On the two most frequently used tests of intelligence, Stanford-Binet and Wechsler, this represents I.Q.'s of 68 and 70, respectively. (It is emphasized that despite current practice a finding of low I.Q. is never by itself sufficient to make the diagnosis of mental retardation. See Figure 1.)

The upper age limit of the DEVELOPMENTAL PERIOD is placed at 18 years and serves to distinguish mental retardation from other disorders of human behavior.

ADAPTIVE BEHAVIOR is defined as the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group. Since these expectations vary for different age groups, DEFICITS IN ADAPTIVE BEHAVIOR will vary at different ages. These may be reflected in the following areas:

During INFANCY AND EARLY CHILDHOOD in:

1. SENSORY-MOTOR SKILLS DEVELOPMENT
2. COMMUNICATION SKILLS (including speech and language)
3. SELF HELP SKILLS
4. SOCIALIZATION (development of ability to interact with others)

During CHILDHOOD AND EARLY ADOLESCENCE in:

5. APPLICATION OF BASIC ACADEMIC SKILLS IN DAILY LIFE ACTIVITIES
6. APPLICATION OF APPROPRIATE REASONING AND JUDGMENT IN MASTERY OF THE ENVIRONMENT
7. SOCIAL SKILLS (participation in group activities and interpersonal relationships)

and

During LATE ADOLESCENCE AND ADULT LIFE in:

8. VOCATIONAL AND SOCIAL RESPONSIBILITIES AND PERFORMANCES

During infancy and early childhood, sensory-motor, communication, self help, and socialization skills ordinarily develop in a sequential pattern reflective of the maturation process. Delays in the acquisition of these skills represent potential deficiencies in adaptive behavior and become the criteria for mental retardation.

The skills required for adaptation during childhood and early adolescence involve more of the learning processes. This involves the process by which knowledge is acquired and retained as a function of the experiences of the individual. Difficulties in learning are usually manifested in the academic situation but in evaluation of adaptive behavior, attention should focus not only on the basic academic skills and their use, but also on skills essential to cope with the environment, including concepts of time and money, self-directed behaviors, social responsiveness, and interactive skills.

In the adult years, vocational performance and social responsibilities assume prime importance as qualifying conditions of mental retardation. These are assessed in terms of the degree to which the individual is able to maintain himself independently in the community and in gainful employment as well as by his ability to meet and conform to standards set by the community.

It is these deficiencies in adaptive behavior which usually determine the need of the individual for programs or services and/or legal action as a mentally retarded person.

In INFANCY and EARLY CHILDHOOD, deficits in sensory-motor development, in acquisition of self-help and communication skills,and development of socialization skills point to the needs for medical services, for early childhood education, or for family guidance.

During CHILDHOOD AND EARLY ADOLESCENCE, deficits in learning and coping skills indicate needs for specialized educational, prevocational, and recreational programs.

In the LATE ADOLESCENT AND ADULT years, deficits determine the needs for vocational training, placement, and a variety of supportive services.

Both the INTELLECTUAL LEVEL and the ADAPTIVE BEHAVIOR LEVEL should be considered in making classifications. While it is recognized that there is a positive correlation between intelligence and adaptive behavior, demonstrations of variability in individuals indicate that separate measures are warranted. Only those individuals who demonstrate deficits in both measured intelligence and adaptive behavior are classified as being mentally retarded, as illustrated in Figure 1.

INTELLECTUAL FUNCTIONING

| ADAPTIVE BEHAVIOR | | |
|---|---|---|
| Retarded | Mentally Retarded | Not Mentally Retarded |
| Not Retarded | Not Mentally Retarded | Not Mentally Retarded |

Within the framework of the definition of mental retardation, an individual may meet the criteria of mental retardation at one time in life and not at some other time. A person may change status as a result of changes or alterations in his intellectual functioning, changes in his adaptive behaviors, changes in the expectations of the society, or for other known and unknown reasons. Decisions about whether an individual is classified as mentally retarded at any given time are always made in relation to behavioral standards and norms and in comparison to the individual's own chronological age group.

| AGE AND LEVEL INDICATED | ILLUSTRATIONS OF HIGHEST LEVEL OF ADAPTIVE BEHAVIOR FUNCTIONING |
|---|---|
| Age 3 years and above:<br>PROFOUND<br>(Note: All behaviors at greater degree of impairment would also indicate PROFOUND deficit in Adaptive Behavior for persons 3 years of age or above.) | Independent functioning: Drinks from cup with help; "cooperates" by opening mouth for feeding.<br>Physical: Sits unsupported or pulls self upright momentarily; reaches for objects; has good thumb-finger grasp; manipulates objects (e.g., plays with shoes or feet).<br>Communication: Imitates sounds, laughs or smiles back (Says "Da-da, buh-buh"responsively); no effective speech; may communicate in sounds and/or gestures; responds to gestures and/or signs.<br>Social: Indicates knowing familiar persons and interacts non-verbally with them. |
| Age 3 years: SEVERE<br>Age 6 years and above:<br>PROFOUND | Independent functioning: Attempts finger feeding; "cooperates" with dressing, bathing, and with toilet training; may remove clothing (e.g., socks) but not as act of undressing as for bath or bed.<br>Physical: Stands alone or may walk unsteadily or with help; coordinates eye-hand movements.<br>Communication: One or two words (e.g., Mama, ball) but predominantly vocalization.<br>Social: May respond to others in predictable fashion; communicates needs by gestures and noises or pointing; plays "patty-cake" or plays imitatively with little interaction; or occupies self alone with "toys" few minutes. |
| Age 3 years: MODERATE<br>Age 6 years: SEVERE<br>Age 9 years and above:<br>PROFOUND | Independent functioning: Tries to feed self with spoon; considerable spilling; removes socks, pants; "cooperates" in bathing; may indicate wet pants; "cooperates" at toilet.<br>Physical: Walks alone steadily; can pass ball or objects to others; may run and climb steps with help.<br>Communication: May use four to six words; may communicate many needs with gestures (e.g., pointing).<br>Social: Plays with others for short periods, often as parallel play or under direction; recognizes others and may show preference for some persons over others. |

| AGE AND LEVEL INDICATED | ILLUSTRATIONS OF HIGHEST LEVEL OF ADAPTIVE BEHAVIOR FUNCTIONING |
|---|---|
| 3 years: MILD<br>6 years: MODERATE<br>9 years: SEVERE<br>12 years and above: PROFOUND | Independent functioning: Feeds self with spoon (cereals, soft foods) with considerable spilling or messiness; drinks unassisted; can pull off clothing and put on some (socks, underclothes, boxer pants, dress); tries to help with bath or hand washing but still needs considerable help; indicates toilet accident and may indicate toilet need.<br>Physical: May climb up and down stairs but not alternating feet; may run and jump; may balance briefly on one foot; can pass ball to others; transfers objects; may do simple form-board puzzles without aid.<br>Communication: May speak in two or three word sentences (Daddy go work); name simple common objects (boy, car, ice cream, hat); understands simple directions(put the shoe on your foot, sit here, get your coat); knows people by name. (If non-verbal, may use many gestures to convey needs or other information.)<br>Social: May interact with others in simple play activities, usually with only one or two others unless guided into group activity; has preference for some persons over others. |
| 6 years: MILD<br>9 years: MODERATE<br>12 and above: SEVERE<br>15 years and above: PROFOUND | Independent functioning: Feeds self with spoon or fork, may spill some; puts on clothing but needs help with small buttons and jacket zippers; tries to bathe self but needs help; can wash and dry hands but not very efficiently; partially toilet trained but may have accidents.<br>Physical: May hop or skip; may climb steps with alternating feet; rides tricycle (or bicycle over 8 years); may climb trees or jungle gym; play dance games; may throw ball and hit target.<br>Communication: May have speaking vocabulary of over 300 words and use grammatically correct sentences. If non-verbal, may use many gestures to communicate needs. Understands simple verbal communications including directions and questions("Put it on the shelf" "Where do you live?"); (Some speech may be indistinct sometimes.) May recognize advertising words and signs (Ice Cream, STOP, EXIT, MEN, LADIES). Relates experiences in simple language.<br>Social: Participates in group activities and simple group games; interacts with others in simple play ("Store,""House,") and expressive activities (art and dance). |

| AGE AND LEVEL INDICATED | ILLUSTRATIONS OF HIGHEST LEVEL OF ADAPTIVE BEHAVIOR FUNCTIONING |
|---|---|
| 9 years: MILD<br>12 years: MODERATE<br>15 years and older: SEVERE | Independent functioning: Feeds self adequately with spoon and fork; can butter bread; (needs help with cutting meat); can put on clothes and can button and zipper clothes; may tie shoes; bathes self with supervision; is toilet trained; washes face and hands without help.<br>Physical: Can run, skip, hop, dance; uses skates or sled or jump rope; can go up and down stairs alternating feet; can throw ball to hit target.<br>Communication: May communicate in complex sentences; speech is generally clear and distinct; understands complex verbal communication including words such as "because" and "but." Recognizes signs, words, but does not read with comprehension prose materials.<br>Social: May participate in group activities spontaneously; may engage in simple competitive exercise games (dodge ball, tag, races). May have friendship choices which are maintained over weeks or months.<br>Economic activity: May be sent on simple errands and make simple purchases with a note; realizes money has value but does not know how to use it (except for coin machines).<br>Occupation: May prepare simple foods (sandwiches); can help with simple household tasks (bedmaking, sweeping, vacuuming); can set and clear table.<br>Self Direction: May ask if there is "work" for him to do; may pay attention to task for 10 minutes or more; makes efforts to be dependable and carry out responsibility. |
| 12 years: MILD<br>15 years and older: MODERATE | Independent functioning: Feeds, bathes, dresses self; may select daily clothing; may prepare easy foods (peanut butter sandwiches) for self or others; combs/brushes hair; may shampoo and roll up hair; may wash and/or iron and store own clothes.<br>Physical: Good body control; good gross and fine motor coordination.<br>Communication: May carry on simple conversation; uses complex sentences. Recognizes words, may read sentences, ads, signs, and simple prose material with some comprehension.<br>Social: May interract cooperatively and/or competetively with others. |

| AGE AND LEVEL INDICATED | ILLUSTRATIONS OF HIGHEST LEVEL OF ADAPTIVE BEHAVIOR FUNCTIONING |
|---|---|
| (continued) | Economic activity: May be sent on shopping errands for several items without notes; makes minor purchases; adds coins to dollar with fair accuracy.<br>Occupation: May do simple routine household chores (dusting, garbage, dishwashing, prepare simple foods which require mixing).<br>Self direction: May initiate most of own activities; attend to task 15-20 minutes (or more); may be conscientious in assuming much responsibility. |
| 15 years and adult: MILD<br>Note: Individuals who routinely perform at higher levels of competence in adaptive behavior than illustrated in this pattern should NOT be considered as deficient in adaptive behavior. Since by definition an individual is not retarded unless he shows significant deficit in both measured intelligence and adaptive behavior, those individuals who function at higher levels than illustrated here cannot be considered to be retarded. | Independent functioning: Exercises care for personal grooming, feeding, bathing, toilet, may need health or personal care reminders; may need help in selection of purchase of clothing.<br>Physical: Goes about hometown (local neighborhood in city, campus at institution) with ease, but cannot go to other towns alone without aid; can use bicycle, skis, ice skates, trampoline or other equipment requiring good coordination.<br>Communication: Communicates complex verbal concepts and understands them; carries on everyday conversation, but cannot discuss abstract or philosophical concepts; uses telephone and communicates in writing for simple letter writing or orders but does not write about abstractions or important current events.<br>Social: Interacts cooperatively or competitively with others and initiates some group activities; primarily for social or recreational purposes; may belong to a local recreation group or church group, but not to civic organizations or groups of skilled persons (e.g., photography club, great books club, or kennel club); enjoys recreation (e.g., bowling, dancing, TV, checkers, but either does not enjoy or is not competent at tennis, sailing, bridge, piano playing or other hobbies requiring rapid or involved or complex planning and implementation).<br>Economic activity: Can be sent or go to several shops to make purchases (without a note to shopkeepers) to purchase several items; can make change correctly, but does not use banking facilities; may earn living but has difficulty handling money without guidance.<br>Occupation: Can cook simple foods, prepare simple meals; can perform everyday household tasks (cleaning, dusting, dishes, laundry); |

| | |
|---|---|
| (continued) | as adult can engage in semi-skilled or simple skilled job.<br>Self direction: Initiates most of own activity; will pay attention to task for at least 15-20 minutes; conscientious about work and assumes much responsiblity but needs guidance for tasks with responsibility for major tasks (health care, care of others, complicated occupational activity). |

# Out of the Classroom

## Keeping Exceptional Children in Regular Classes

Florence Christoplos

The goal of integrating exceptional children into regular classes is currently receiving favorable attention. Financial necessity and disappointing results from special or segregated classes have been instrumental in initiating this trend. An additional justification is that broadly heterogeneous classes are a means for children to develop respect for all persons and for the dignity of human life. Ability segregated classes are believed to have detrimental effects on both the feelings of exceptional children about themselves and of others toward them (Billings, 1963; Meyerowitz, 1962; Rapier, Adelson, Carey, & Croke, 1972). It is hoped that the alternative of heterogeneous classes, in which models of respect and consideration toward a variety of individuals may be observed and reinforced frequently, may develop mutual and self respect more effectively.

A final, but by no means minor, purpose in having ability integrated classes is the growing awareness of the need for curricula relevant to and reflective of human variability rather than of artificial norms and averages. General education is expected to allow for the meaningful inclusion and appreciation of ethnic, racial, sexual, physical, and ability variations without judgments about which course or method of study is more desirable. Individual differences are not to be viewed as deviations from the norm but as the basis on which the context and methods of a school curricula are to be built.

### Effective Realization of Heterogeneous Classes

A major task resulting from wider classroom heterogeneity is the identification of feasible curricula and management techniques for regular classes that will allow integration of ability levels without lowering the academic achievement of any child and, possibly, improving the academic achievement of all children. Special management techniques must be developed that will ease the time and energy burdens on teachers.

This article is a summary of teacher education priorities arrived at after experiences in first grade public school classes under a pilot learning disabilities teacher education program conducted with US Office of Education/Bureau for Education of the Handicapped support. The author and three fellowship students worked with first grade teachers in three elementary schools in Baltimore. The goal was to have the regular class teachers feel confident enough to retain learning disabled children in their classes. The teachers were not expected to make exceptions to their general goals or procedures or to have specialized programs for learning disabled children. Instead, the goal was to help the teachers broaden their approaches so that all children would be incorporated more successfully into regular programs at a level manageable for each child and for the teacher.

In order to prescribe total class activities relevant to the teacher's goals and in which the learning disabled child could participate successfully, the teacher's methods with the whole class were observed and suggestions were made for more effective techniques. The suggested techniques always involved the active and successful participation of the children with whom the teacher had so far been unsuccessful, that is, the learning disabled child.

## Tutoring as an Integration Technique

The first critical condition for successful integration of exceptional children into regular classes is the use of interstudent tutoring so that (a) teachers will not be overwhelmed by the variety of children, curricula, and materials; (b) children will have one to one relationships in learning experiences, a most desirable condition for effective skill mastery; and (c) fostering cooperative attitudes and mutual and self respect, a major educational goal, will be realized and practiced in the classroom.

Tutoring may be interpreted in various ways. Usually the tutor is expected to be a more capable and older child, but this need not be the case. A total within class tutoring situation, within a self contained classroom, may be developed. For example, for the skill of letter naming, the child who knows only five letters may tutor the child who knows only three. The tutor himself thus has additional and needed opportunities to overlearn what he knows or just recently learned by teaching the skill to another. In the same way each tutor is also tutored by another child who knows more letters. The teacher's role, under these circumstances, is to keep records of each child's progress so that appropriate assignment of tutor-tutee relationships may be made. The teacher works with the top few children as their tutor and also makes suggestions to all pairs for variation of tutoring techniques when a child's record indicates unsatisfactory progress. In order to strengthen the sense of responsibility between tutor and tutee, the tutor should accompany each tutee when the teacher tests the tutored child for skill mastery.

This total class procedure has many advantages: fluid pairing of children, no rigid classification by ability, individualized tutoring, individualized rates of progress, and total class involvement in related activities. An example of the latter point is the lowest performing child being tutored in name recognition or even picture discrimination in a hierarchy of tutor-tutee relationships while the highest performing child is working on naming or sounding the entire alphabet.

Interstudent tutoring and assistance is an obvious and effective advantage that ability integrated classes have over ability segregated classes. Tutoring has been found to affect more positively the achievement of the tutor than the one tutored and thus should not be limited to having only top students in the role of tutor (Croth, Whelan, & Stables, 1970; Findley & Bryan, 1971; Niedermeyer & Ellis, 1971). For those who would appreciate ready made commercial materials in initiating a tutoring system, Book-Lab, Inc. (Brooklyn, New York) has developed a kit for classroom pairing for a reading program.

Extensive use of tutoring alleviates pressures on the teacher's time without the teacher abnegating essential responsibilities for student programing. In addition, the direct relationship of tutoring to goals of respect and cooperation among individuals who differ widely on many dimensions is self evident.

## Record Keeping and Task Analysis

From the techniques of tutoring, two additional techniques emerge as necessary for successful integration of all ability levels without overburdening the teacher: record keeping and task analysis. Sophisticated record keeping techniques have emerged predominantly from the efforts of those involved in operant conditioning techniques in which measuring specific behaviors of individuals is a basic tool. The techniques recently have been generalized to all types of educational measurement. The Spring 1971 issue of TEACHING Exceptional Children (Vol.3, No.3) is devoted totally to an explanation of Ogden Lindsley's precision teaching methods, which are basically measurement techniques. The December 1971 issue of Focus on Exceptional Children (Vol.3, No.7) is also devoted to "Behavior Measurement in the Classroom," and Precision Teaching (Kunzelmann, H.P., Ed., Seattle, Washington: Special Child Publications, 1970) describes record keeping devices for a wide variety of academic and social behaviors. All of these sources present charts or graphs, usually kept by the child, through which highly accurate information is at all times available both to the child and the teacher about the child's progress and his present level of performance. For the teacher with a strong self concept and a sense of humor, graphs may be kept by the students on the behaviors of the teacher that both the students and the teacher would like to see modified, for example, scolding, negative comments, positive comments, or repetitions.

Record keeping devices also mesh well with tutoring. For example, the number of correct answers during interstudent drills and tutoring sessions may be graphed, and after a stipulated number of perfect drills have been recorded by one student for another, the teacher would be asked to do final skill testing and advancement.

Another skill that teachers must develop in order for the tutoring and recording procedures to be conducted successfully is the ability to analyze tasks and to break them into smaller components. This skill must be mastered if a child is to perform successfully within a given subject or task sequence. This competency operationalizes the old educational adage, to teach at the child's level. To teach effectively, the pupil's abilities, not disabilities, must be known. In the terminology of programers, this competency is stated as the ability to identify entering competencies which lead to the criterion goal for that particular program. Mager and Pipe (1970) described this competency as the ability to state performance discrepancies. As an example, for the terminal objective of writing the first name in legible manuscript, the pupil may be described as able to identify the sequence of the first four letters in his or her name and to reproduce the first two letters in sequence. In this case the teaching steps to follow are implied much more clearly than had the description merely indicated that the pupil could not reproduce his name successfully in manuscript.

An example of breaking science tasks into subordinate capabilities is Science: a Process Approach Program (Xerox Corporation, 1963) developed by the American Association for the Advancement of Science (AAAS). Gagne was the major program developer in this AAAS science program and also developed and explained the process of deriving subordinate capabilities or validating the proposed sequence of competencies leading to a terminal goal (1967). Gagne saw the necessity for educational research to focus on verifying the existence of a hierarchy of abilities in school subjects. Teachers must realize that their own professional judgments about which enabling task is prerequisite to another must be verified in practice. For example, for confidence in the statement that A is prerequisite to B, children who have mastered B must be shown to have already mastered A. Otherwise A may be a parallel skill to B but not a prerequisite. Other texts which provide teachers with guidelines for analyzing tasks are Popham and Baker's Planning an Instructional Sequence (Englewood Cliffs, N.J.: Prentice-Hall, 1970), Mager and Beach's Developing Vocational Instruction (Palo Alto, Cal.: Fearon, 1967), and Mager and Pipe's Analyzing Performance Problems (Palo Alto, Cal.: Fearon, 1970).

## Minimizing Traditional Assessment Procedures

Finally, only after the above general classroom techniques have been tried is there any need for psychological assessment of individual children in the usual sense of the term. Assessment then is initiated at the teacher's request because of difficulties in successfully fitting the child into regular task sequences, procedures, or activities. In these cases the diagnosis revolves almost totally around the child's performance in the activity area into which the teacher is trying to fit the child. Other testing is peripheral to the goal of successful integration of a child into ongoing activities. The types of tests used, therefore, are different for each child depending on three factors: (a) the activity or goal into which the teacher is having difficulty integrating the child, (b) the level of successful performance of the child in relation to that goal, and (c) peripheral skills or knowledges that may be deficient and are suspected of being directly related to the child's difficulties in the critical classroom subject area. The third factor of assessment is not always required and is explored only when decisions based on the first two factors are not considered sufficient to assure success.

Individualzed diagnostic/prescriptive teaching is currently a popular phrase usually interpreted to mean intensive and individually administered assessment of a child. This assessment may consist of a series of formal tests such as the Illinois Test of Psycholinguistic Abilities (ITPA), subtests of the Wechsler Intelligence Scale for Children (WISC), and the Bender Gestalt, and informal checklists such as those recently developed by Peterson, Myklebust, Valett, and others. This predetermined, total battery of formal and informal tests is given to all children suspected of being learning disabled, under the assumption that from the results an individualized curriculum for implementation in the regular classroom may be developed. Under this approach the teacher's general classroom goals and procedures are not considered. The teacher is expected to devote extra time to teach the exceptional child or else designate an aide to implement the programing suggestions recommended by the specialists who tested the child. In both cases the chances for successful implementation are threatened because of additional time demands on the teacher and because the child is made an exception to the ongoing program and not part of it.

On the other hand, the approach in this article deviates from the usual one in several respects. The starting point is the teacher's goals and methods in regard to the entire classroom. Inservice retraining or renewal becomes the priority focus for funding and program development if these recommendations for ability integration are to be taken seriously. The exceptional child is believed best served when specialists help the regular class teachers to develop a workable curriculum that allows multiability level success within the context of general education. Only when these attempts are exhausted does the need for individual diagnosis in the traditional sense arise, and then the goal of reintegration into specific classroom activities is the guide to what types of diagnostic tests to use and what prescriptions to develop.

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# CONFLICT IN THE CLASSROOM:

## The Education of Emotionally Disturbed Children

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# IN-SCHOOL SCREENING OF CHILDREN WITH EMOTIONAL HANDICAPS

Eli M. Bower and Nadine M. Lambert

## What is Meant by "Emotionally Handicapped"?

An understanding of what is meant by "emotionally handicapped" is a prerequisite for effective use of the screening process. Mental or emotional health is inferred from the degree of freedom an individual has in choosing from among alternative kinds of behavior. Conversely, mental or emotional disturbance can be inferred from individual behavior which is limited, inflexible, and restricted. Such limitations or restrictions serve to reduce the individual's relative freedom of choice in social and educational endeavors. The reduction of personal maneuverability and flexibility in a changing environment increases the individual's difficulties in adapting to the pressures and changes of life. As a result, the emotionally handicapped person shows increasing susceptibility to behavioral difficluties and interpersonal friction. . . .

Specifically, the emotionally handicapped child is defined as having moderate to marked reduction in behavioral freedom, which in turn reduces his ability to function effectively in learning or working with others. In the classroom, this loss of freedom affects the child's educative and social experiences and results in a noticeable susceptibility to one or more of these five patterns of behavior:

1. An inability to learn which cannot be adequately explained by intellectual,sensory, neurophysiological, or general health factors.

   An inability to learn is, perhaps, the single most significant characteristic of emotionally handicapped children in school. Non-learning of this kind may be manifested as an inability to profit from any school learning experiences as well as an inability to master skill subjects. The non-learner may fall behind almost imperceptibly in the first few grades but finds himself in deep water by the time he reaches 4th grade. There are some students, too, who seem to be keeping pace until they reach junior high school, when they begin to flounder badly.

   By whatever symptoms the inability manifests itself, we will, as educators, seek the cause or causes. And once we have ruled out intellectual, sensory, neurophysiological and general health factors, there remain emotional conflicts and resistances to be investigated as major causes of learning disabilities.

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

It is not just "getting along" with others that is significant here. The term "satisfactory interpersonal relations" refers to the ability to demonstrate sympathy and warmth toward others, the ability to stand alone when necessary, the ability to have close friends, the ability to be aggressively constructive, and the ability to enjoy working and playing with others as well as to enjoy working and playing by oneself. In most instances, children who are unable to build or maintain satisfactory interpersonal relationships are noticed by their peers, or are most clearly visible to their peers. Teachers, however, are also able to identify many such children after a period of observation.

3. Inappropriate or immature types of behavior or feelings under normal conditions.

   Inappropriateness of behavior or feeling can often be sensed by the teacher and peer groups. "He acts like a baby almost all the time," or "He acts funny lots of times," are judgments often heard that describe such behavior. The teacher may find some children reacting to a simple command, like "Please take your seat," in wildly disparate or incongruous ways. What is appropriate or inappropriate, mature or immature, is best judged by the teacher using his professional training, his daily and long-term observation of the child, and his experience working and interacting with the behavior of large numbers of children.

4. A general pervasive mood of unhappiness or depression.

   Children who are unhappy most of the time may demonstrate such feelings in expressive play, art work, written composition, or in discussion periods. They seldom smile and usually lack a "joy of living" in their school work or social relationships. In the middle or upper grades self-inventory is usually helpful in confirming suspicions about such feelings.

5. A tendency to develop physical symptoms, such as speech problems, pains, or fears associated with personal or school problems.

   Often,this tendency is first noted by the child himself. Illness may be linked regularly to school pressures or develop when a child's confidence in himself is under stress. Speech difficulties resulting from emotional distress are usually painfully audible to the teacher and parent.

To sum up, then: the significant patterns of behavior in children indicating a need for closer scrutiny by a reacher are: inability to learn, unsatisfactory interpersonal relationships, inappropriate behavior, unhappiness, repetitive symptoms of illness after stress. . . .

# CONTINUITY AND UNITY IN SPECIAL EDUCATION

## A model of functional levels in diagnosis and intervention designed to return handicapped children to the mainstream

A.J. Pappanikou
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Much time and many pages in the literature have been spent heralding different environmental approaches to the prevention and amelioration of handicapping conditions in children. These procedures often focus on minimizing the stigma and maximizing the handicapped individual's social contact and affiliation with "normal" role models. It is significant to note that these normalization models often preclude "special class" placement, almost implying that since one approach didn't work, something else should be tried. What has occurred, in effect, is one of the very same phenomena occurring in mass instructional practice that causes special education to no longer be special: conceptualizing acceptable instructional models in terms of potential panaceas.

In direct response to the need for new models in special education, M. C. Reynolds presented a conceptual framework of services ranging from mildly involved youngsters enrolled in regular classes receiving minimal ancillary help to residential treatment centers for those manifesting severe deviations.[1] R. J. Whelan conceived of a similar scheme in the form of a facilitative educational program in which a continuum of instructional services and learning environments is provided, with the objective of each unit on the continuum being the achievement of regular class placement whenever the pupil has acquired the skills and behaviors necessary for successful progress within that environment.[2]

These schemes are inherently child-oriented and provide a delivery system composed of a wide spectrum of necessary services. However, additional variables exist, not specifically addressed in either model, which ultimately affect the impact of such a system on exceptional children. For example, a considerable amount of research has provided convincing evidence that complex responses can be learned through mere observation of appropriate models.[3]

It seems crucial that, whenever possible, a heterogeneous interaction of children occur at all levels of the continuum. In other words, emotionally handicapped children should maintain contact with "normal," strong individuals so that positive behaviors will be provided for emulation. Classroom placement should serve as a therapeutic agent and ideally prevent pathology from becoming a self-perpetuating system. In addition to the positive imitative effects made possible, each child would also be provided with an opportunity to involve himself freely with youngsters representing the "normal" mainstream, so that reality testing would be an ongoing process. Thus the traditional breach between special education and the regular classroom would be eliminated.

A weakness of other models is their attempt to unify all special services under one umbrella. Administrative attempts to pull together disparate special education programs in a unified way result in arrangements which are nothing more than a patchwork of still unrelated professional specialties. Thus consultants and resource rooms are brought under the same mantle as tutors, guidance and counseling services, special classes and residential treatment centers. This "cascade system of special education" leads to discontinuity as a student passes from one separate service entity to the next. This discontinuity also reflects extreme disagreement regarding objectives and methods as seen by the different professional specialties. The resulting confusion is imposed upon the student, who deserves a better orchestration of efforts among those responsible for his education.

One way to establish an administrative structure based on a continuum which has maximal likelihood of providing continuous progress would be to place major emphasis upon functions to be performed rather than upon the nature of a certificated specialty, viz., learning disabilities, social work, mental retardation, psychology, etc.

The question then becomes, What functions are to be provided at what level of the continuum? Such functions depend on what are perceived as the final objectives toward which one works with individual children. If all members of a special education staff could agree that the primary objective is to return each student to his regular class equipped to better cope with that behavioral or academic task which he previously could not manage, much of the confusion about objectives would evaporate.

It is faulty to assume that a child referred for special education services manifests a problem in isolation. Often, these educational and social problems exist in combinations or clusters and, as such, demand solution through multifaceted approaches. Parent involvement and consultation in recycling programs are necessary to varying degrees in order to provide maximum efforts in behalf of the child. Likewise, the spectrum of available community resources must not be overlooked. In conceptualizing the functional levels which follow, then, it should be remembered that parents and community resources are employed whenever possible.

Level I - Classroom Intervention. The basic objectives at this level are: 1) to detect behavioral and/or academic deficits which have the potential for serious consequences before they have become firmly ingrained in the child's behavioral repertoire; 2) to carry on this process in the milieu of the "regular" classroom; 3) to institute systematic changes which have the goal of either diminishing that deficit or that substitute alternative ways of dealing with conflict/failure situations; and 4) to persist at this effort despite possible regressions until it is reasonably judged, by a previously established consultative source independent of the school's daily functions, that the problem has been satisfactorily resolved or that additional intervention techniques are necessary. Should efforts at this level continue to be of minimal effect, Level II is to be employed.

Level II - Extra-classroom Diagnosis. This level is characterized by the following objectives: 1) to provide an educational diagnosis of skill deficiencies demonstrated by the child; 2) to identify those learning modalities successfully and comfortably employed by the child; and 3) to utilize the results of this diagnosis, based upon individual work with the pupil, in the development of methods which can be implemented within the "regular" classroom.

Upon the completion of Level II activities, employement of Level I functions may again be resumed. Should it not be possible to implement the prescriptive recommendations of the diagnostic level within the regular classroom, and should the independent consultative source concur with such a judgment, activities in Level III, IV, or V may be introduced.

Level III - Extra-Classroom Assistance. The major objective of this level is to enable the student to experience mastery and successful practice of the task (academic or behavioral) which presented the original problem in a one-to-one or small-group instructional setting. The portion of the school day during which this one-to-one supplementation is provided would vary with the demonstrated needs of the pupil. In no case would it take so much time that membership in his own class becomes questionable. After the task has been mastered and practiced and the student has acquired a reasonable degree of confidence, so that he can successfully employ these newly acquired strategies in the classroom, Level I classroom intervention is reinstated. If the student's deficits are profound or appear to be broadly based, a more intensive approach may be necessary.

Level IV - Intensive Extra-Classroom Assistance Plus Social Exposure. This level provides supplementary help as described in Level III but is more intense, covering several subject or behavioral areas. This necessitates use of a larger portion of each school day and more days of the school year. This level is analogous to a self-contained special class, but one that is not terminal. At this level, identification with regular class peers is secondary to the behavior recycling process. When the student is behaviorally ready, he will be provided with concentrated work designed to overcome the academic deficits. Here, mastery and successful practice would be stressed, but in contrast with extra-class supplementation, the student would remain at this functional level until a developmental sequence has been completed. Because of the large amount of time spent in self-containment, some form of group instruction would be necessary as a prelude to infusion into the above levels. Yet the deleterious effects of exposure to an amalgam of inappropriate behavioral models, alluded to earlier, must be avoided by introducing the pupil gradually to a small, already functioning, highly structured, success-oriented group such as that in Level III.

Inherent in the success of functional Level IV is the notion that groups must be formed slowly and with definite plans in mind regarding individual interactions and modeling effects on the proposed group members. Thus group formation necessarily implies a slow and judicious phasing-in of prospective members. The failure of many self-contained special class programs to contribute positively to the education of disturbed children results in large part from neglect of this phasing-in principle.

It is conceivable that there will be some students for whom the procedures at Level IV will not be sufficient. In such instances, a more consistently controlled approach may be necessary to effectuate the development of positive behavioral cycles.

Up to this point, every attempt has been made to discover and remedy emerging and extant deficits within the setting of the school. If these attempts have not succeeded, it may well be that the more intractable difficulties presented by the child are made unapproachable by ecological considerations that stand in opposition to prescribed strategies.

Level V - Short-term Controlled Environment. In order to control for the contributing effects of these ecological variables, short-term residential units are proposed. The immediate objective at this level is to provide an educational clinic where individual diagnostic findings would be translated into prescriptive, uncontrolled ecological factors.

Additional advantages would include the availability of an interdisciplinary team to consider and plan strategies and milieus not possible to manipulate within the regular school atmosphere. For example, the introduction of different teaching styles to the student may reveal that his relationship with a particular teacher prevented educational and behavioral progress. Observation of the pupil would be possible for 24 hours a day rather than just the six hours in school.

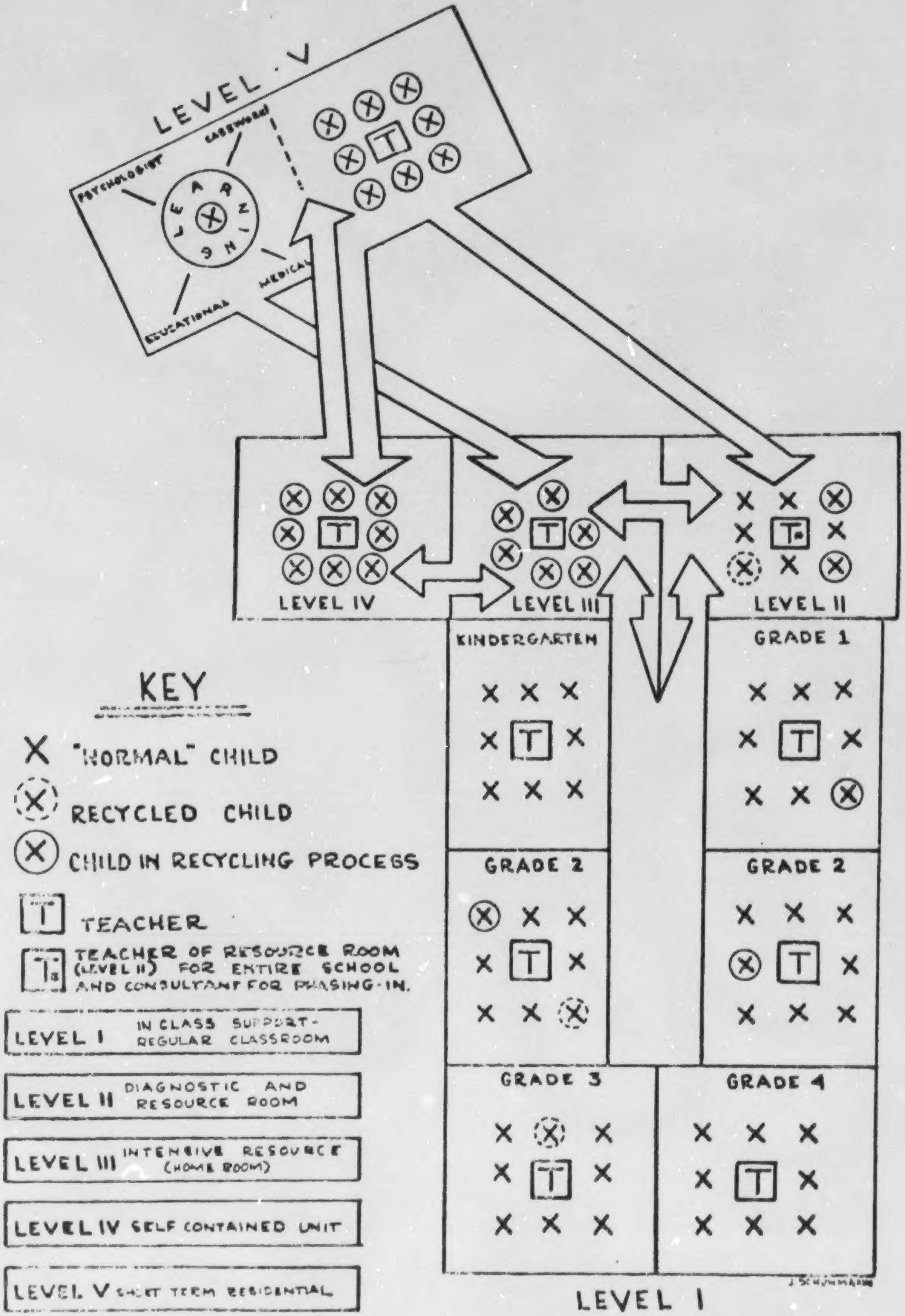
These centers would be located as geographically near the local school district as possible and would be an extension of the public school system (or regional public school system) in general and the special education continuum in particular. The main objective of the center would be to discover those techniques which it would be possible for the special education continuum to implement within the regular school and which are maximally effective with the referred students. The center would thus be "educationally" responsible to two clients, the child and the school. Consequently, the center staff would become cognizant of the finer nuances of education as practiced in that district, including those related to special education.

With respect to this level, the emphasis is on short-term residential evaluation. Only in an extremely rare situation could it be conceived that a child would spend more than six weeks in the proposed controlled environment. A return of the child to the sending school would ensue, with recommended procedures and methods devised and prescribed. The report would also recommend the level of special education continuum in which the child should be placed. This decision would be arrived at with the full cooperation and planning of the sending school. Inherent in any successful implementation is the "active consultation" role of the center's staff. "Active consultation" would take the form of a liaison person to consult with the teacher in developing the prescribed educational intervention.[4] When the teacher and liaison person feel that the child has entered a positive recycling process, the function of the former should gradually wane in both visits and personal contacts.

In summary, the continuum of special education services postulates a fluid mobility for the pupil, when such mobility is deemed appropriate. The model allows for the child to move systematically through the levels heretofore described until he can consistently function independently in a regular class. The determination of placement at a given level is decided on the basis of the child's level of functioning, not his previous placement at a specific functional level.

At all times and with all children, it may be necessary to initiate or resume Level I activities in order that the nature of the preventive aspects of this model become the rule rather than the exception in the "regular education" mainstream.

This continuum model, based upon functional evels, is aimed at making the term "special education" synonymous with quality education. Identification


LEVEL V
PSYCHOLOGIST
CASEWORK
LEARNING
MEDICAL
EDUCATIONAL
T
LEVEL IV
LEVEL III
LEVEL II
KINDERGARTEN
GRADE 1
GRADE 2
GRADE 2
GRADE 3
GRADE 4
LEVEL I
J. SCHUHMANN
KEY
X "NORMAL" CHILD
RECYCLED CHILD
CHILD IN RECYCLING PROCESS
TEACHER
TEACHER OF RESOURCE ROOM (LEVEL II) FOR ENTIRE SCHOOL AND CONSULTANT FOR PHASING-IN.
LEVEL I IN CLASS SUPPORT-REGULAR CLASSROOM
LEVEL II DIAGNOSTIC AND RESOURCE ROOM
LEVEL III INTENSIVE RESOURCE (HOME ROOM)
LEVEL IV SELF CONTAINED UNIT
LEVEL V SHORT TERM RESIDENTIAL

of incipient behavioral and educational problems carries with it the risk of making something out of nothing. To the extent that this model is successful in returning students to the mainstream do we then discover those instances where the mainstream would do well to return to the student.

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[1] M.C. Reynolds, "Framework for Considering Some Issues in Special Education," Exceptional Children, vol. 28, 1962, pp. 267-70.

[2] R.J. Whelan, "Special Education: A Guide for Planning and Organizing Facilitative Education Programs," unpublished manuscript, University of Kansas, 1970.

[3] A. Bandura, Principles of Behavior Modification (New York: Holt, Rinehart and Winston, 1969).

[4] A.J. Pappanikou et al., "Approaches Leading to Prevention of Emotional Disturbances in Children in Rural School Settings," unpublished investigation, University of Connecticut, 1968.

## BEHAVIORAL CHARACTERISTICS OF CHILDREN
## WITH SPECIAL LEARNING DISABILITIES

### I. Hyperactivity

Nonpurposeful activity. Child is in perpetual motion, wanders about the room, falls out of chair, knocks over books when he gets up from his desk, etc.

### II. Short Attention Span

Child does not finish tasks, daydreams. Mind keeps wandering.

### III. Distractibility

Child is seemingly forced to pay attention to irrelevant stimuli. The foreground and background of his world are of equal strength, and he cannot judge what is relevant and what is not.

### IV. Perseveration

Perseveration is the repetition of a previous response after it is no longer appropriate. It results from the child's inability to "repattern" his thinking quickly enough to give a new response.

An example of verbal perseveration is when a child gives or "echos" the response just given to a previous question when he is called on in class.

An example of motor perseveration is when a child starts to draw a picture and includes a few birds in the sky and finishes with the entire picture filled with birds.

### V. Perceptual Impairment

Child does not see or hear things as they are. He "looks," but cannot "see"; he "hears," but cannot "listen." To him life is a distortion. His senses send messages to the brain, but the messages become scrambled. He may see numbers backwards or hear and say words in a jumbled manner.

VI. Emotional Behavioral Characteristics

The child may show a quick shift in emotional state. He gets frustrated easily because most tasks he starts to do end in disaster. Often he has difficulty in communication so that when his "breaking point" is reached, he may yell, scream, cry, or fight. His ability to cope emotionally with situations may vary from moment to moment, hour to hour, or day to day.

VII. Motor Coordination Deficits

Child is not typically good in athletics. He cannot catch a ball because his eyes and hands won't coordinate. He may have difficulty with tying shoe laces, buttoning, and other self-help skills. He finds difficulty in sequencing and following the rules of a game.

VIII. Impulsiveness

The impulsive child has difficulty delaying gratification. He wants everything "right now" and cannot wait his turn. He constantly wants attention. He is seemingly forced to pinch, pull, tear, touch, etc., anything in sight. In short, he needs help in developing inner controls.

IX. Deficits: Visual or Auditory

Child may have deficits in visual memory that result in poor detail in drawings, an inability to recall letter or numeral formation, and difficulty in sequencing letters, numerals, or words.

X. Deficits in Concept Formation

Child may not readily generalize. The deficit may be in the inability to recognize relationships among experiences. Therefore, his thinking at times will be termed "concrete." He will show difficulty understanding multiple word meanings, proverbs, and metaphors. Since he has difficulty holding a process in mind, he has special problems in math.

XI. Speech and Hearing Disorders

Child may have sound substitutions or misarticulations. The messages he wants to convey may sound cluttered or jumbled, and there may be some nonfluency.

Child with auditory discrimination or auditory memory problems will probably have sound substitutions and omit medial or final sounds in words. He may have a mild hearing loss. However, this is not considered to be the main cause of his learning problem.

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# LEARNING DISABILITIES

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# THE LEARNING DISABILITIES SPECIALIST: ROLE AND RESPONSIBILITIES

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# THE LEARNING DISABILITIES SPECIALIST: ROLE and RESPONSIBILITIES

During the past 12 years the field of learning disabilities has undergone a very rapid, uneven, and frequently confusing period of growth. The evidence of this growth is readily apparent: The vast majority of school systems across the country have instituted service delivery systems to assist the learning disabled. University teacher training programs are annually producing hundreds of specialists who are presumably proficient in teaching the child and /or adolescent who exhibits school related problems. And 47 states now mention the category of learning disabilities in their administrative guidelines. In addition, two nationally focused organizations (i.e., the Association for Children with Learning Disabilities and the Division for Children with Learning Disabilities, a component of the Council for Exceptional Children) have generated public interest in children experiencing learning problems, initiated school programs for them and obtained funds to support special projects, teacher training programs, and some research. Even the casual observer can see that learning disabilities now represents one of the largest, and perhaps most controversial, categories in special education.

Typical of new educational endeavors which have not yet solidified their philosophical positions or optimum school practices, the learning disabilities movement has experienced a great deal of ambiguity and uncertainty. Major areas of contention among educators and parents are which definition, assessment and remedial procedures, and service delivery systems are thought to be most appropriate for the learning disabled. In addition to these concerns, disputes have also arisen as to what professional groups are best qualified to instruct the learning disabled child — i.e., the "territorial rights" of the learning disability specialist, speech pathologist, reading teacher, etc. The last point is particularly important since funds for most phases of education are being substantially reduced and it is likely that increased competition for pupils will develop among professional groups to ensure that their members will continue to be employed.

To resolve this potential source of conflict as well as to provide the learning disabled child with the most efficient educational opportunities possible, clear and open lines of communication between professionals must be established and maintained. The purpose of this paper is to discuss the responsibilities of the learning disability specialists who are operating in the public schools. In particular, attention will be given to the characteristics of those children who are currently receiving services, the traditional settings in which instruction typically takes place, and commonly used educational approaches which facilitate adequate academic achievement and social adjustment. A comparison between the field activities associated with the learning disability specialist, reading teacher, and speech pathologist should show areas of common interest and overlap as well as provide a point of departure for further dialogue.

# RESPONSIBILITIES OF THE LEARNING DISABILITIES SPECIALIST

The responsibility of the learning disability specialist in the school is to plan, initiate, and maintain educational programs for children who have been labeled learning disabled. Fulfilling this responsibility requires the experience and expertise to solve a multitude of educational problems. For example, every learning disabilities specialist, will need to deal with some or all of the following questions: Of the frequently large numbers of pupils referred to the learning disability specialist, which ones will be identified and eventually labeled as learning disabled? What diagnostic and remedial strategies offer the best hope in assisting the child to receive a quality education? Would it be more efficient to establish a resource room consulting teacher program, or self-contained class? Are other specially trained personnel available in cases where relatively unique problems exist?

Answers to these and other questions will, to a large extent, depend upon the LD specialist's experience and professional training, and the unique characteristics of the individual school or school system. While personal experience and individual school systems vary, the training received by most professionals follows a somewhat more consistent pattern. The majority of educators certified to teach the learning disabled have usually spent at least several years teaching in the regular classroom. In fact, many universities require valid elementary or secondary teaching credentials as well as documentation of one to two years of successful school experience before admission to a course sequence leading to certification in learning disabilities. Once admitted to the program, the student will typically enroll for 12 to 36 credit hours dealing with such topics as learning theory, child development, theoretical approaches to learning disabilities, techniques of diagnosis and remediation, specialized methods and materials, and research. Most university training programs also require a minimum of one semester of successful field experience in a facility offering services to the learning disabled. When a student is judged to be deficient in basic instructional competencies upon entering a program, additional coursework in the fundamentals of remedial education may be required — e.g, remedial reading, diagnosis and remediation of language disorders, etc.

While all training programs offering certification in learning disabilities address themselves to some or all of these topics, the philosophical orientation and overall quality differ markedly. The direction that these differences take will be discussed later in this paper. There is sufficient information, however, to gain some notion of how large numbers of learning disability specialists are currently operating in the schools. Of particular importance to this paper are the various approaches of these professionals in (1) identifying learning disabled children; (2) planning and conducting specialized educational strategies; and (3) establishing appropriate service delivery systems. It is important to note that this section will discuss these three points not from a theoretical standpoint of what should be done, but rather from the position of what is actually being done in the schools today.

# IDENTIFICATION

The best method for identifying learning disabled children has been a source of continuing debate among and within various professional groups. It is important to recognize that whatever strategy is utilized in the identification process, it must be predicated upon the underlying philosophical position of those who are given responsibility for the task. In general, there are two basic philosophical approaches commonly used to conceptualize and define the problems of the children who have been labeled learning disabled. These approaches include (1) the medical model where an inherent medical or psychological disorder withing the child is hypothesized in order to understand the demonstrated problem; and (2) the academic model where only the observed behaviors considered to be deficient are assessed and remediated in the hopes of ameliorating the child's school failure. The approach taken by professionals will influence the numbers of children viewed as being learning disabled as well as the nature of the educational programs designed to effect change in the pupil's performance.

Professionals who utilize the medical model in identifying learning disabled children hypothesize that children who are so labeled suffer from some underlying pathological condition which is impeding the learning process. In some cases, the cause of the learning problem is viewed as being directly related to brain dysfunction or some other organic condition. In addition to central nervous system dysfunction, psychological "process" disorders are also frequently seen as being a major factor in these children's school behavior.

The medical approach to conceptualizing learning disabilities still retains considerable influence with many persons who function in public and private schools, clinics, and some medical facilities. The influence of the medical model in legislation continues to be strongly felt; 23 states now suggest or require medical input into diagnosis. It is also interesting to note that virtually every state education agency mandates that some "process" disorder within the child be "verified" (i.e., the child must be given a test which purports to measure process abilities) before a pupil can be labeled learning disabled.

While medically oriented professionals hypothesize that some form of neurological and/or psychological dysfunction must be present in every instance of learning disability, more behaviorally oriented professionals seriously question the viability of this approach when applied to the heterogenous population of underachieving children in the public schools. It is apparent that while a small number of children exhibit severe learning problems and are significantly and unmistakenly learning disabled, far larger numbers of children have been identically labeled while evidencing only mild to moderate failure in school. The latter typically give no indication of brain pathology or psychological process disorders. In any event, it is obvious that the majority of public school personnel operate under a liberal interpretation of what constitutes a learning disability in that many "nondisordered" children are now included in this category. Consequently the number now qualifying for special services under the rubric of learning disabilities has increased markedly (Meier 1971).

Like any professional who attempts to identify children with learning disabilities, public school personnel must first operationalize their definition which describes the behavior patterns that should be present in order for a child to be so labeled. According to Hammill (in press), the operational definition used most commonly in schools today is:

> Children with special learning disabilities exhibit problems in listening, thinking, reading, writing, spelling and/or arithmetic.

The use of this definition obviously de-emphasizes the need to establish a physiological or pychological basis for school failure. With this definition, the primary criterion for the identification of the learning disabled is inadequate achievement in school work.

This definition is being used extensively in the schools. Kirk and Elkins (1974) investigated the characteristics of the children identified as learning disabled in the Title VI-G projects across the nation. The majority of children served were of elementary school age and had problems in reading, arithmetic, spelling, and language. Those whose problems were primarily in reading comprised 62% of the subjects; 25% had problems in arithmetic; 24% were listed as having primary problems in language; and 23% had problems in spelling. The authors concluded that only about one-third of the children served could be considered as being truly learning disabled, while the others were pupils who were simply underachieving in academic subjects. These latter children are well-known to every teacher and are frequently referred to as educationally handicapped, disadvantaged, unmotivated, etc. The most prominent behavioral manifestation of this population is that they are performing inadequately in academic subject matter and some exhibit mild behavior problems. It is now common administrative practice in many school systems to label these mildly underachieving children as learning disabled along with the children who exhibit more significant disorders.

In summary, large numbers of school children are now being identified and labeled as learning disabled (the incidence figures from various states run from 3-15% of the total school population). While some of these children exhibit relatively severe disorders which are very likely indicative of some underlying pathological condition, the great majority of children are merely underachieving in one or more of the basic academic subject areas. The etiology of this "mildly handicapped" group is extremely difficult, if not impossible, to accurately determine. However, the problems seem to stem from conditions that are largely affective or social in nature rather than from some inherent disorder within the child. It is the responsibility of the learning disability specialist in conjunction with other professionals in the public schools to (1) assist in the identification of children who are experiencing problems in listening, thinking, reading, writing, spelling, and arithmetic; (2) assist in the selection of children to be labeled as learning disabled, using either his or her own judgment of procedures established by the individual school system; and (3) carry out instructional programs which are designed to alleviate the observed educational deficiency.

## EDUCATIONAL STRATEGIES

Once a child has been identified and labeled as learning disabled, the specialist must plan and conduct an educational program that will enable the child to achieve at a level commensurate with his ability. The nature of the diagnostic and remedial strategies used will be largely determined by the philosophy and professional training of the learning disability specialist. At present there appear to be two basic instructional models commonly employed with the pupil labeled as learning disabled: the process method and the academic method.

THE PROCESS METHOD. Based upon the medical model, the "process" method is predicated on the hypothesis that the majority of these children suffer from some internal disorder that significantly interferes with the efficient utilization (i.e., processing) of sensory data which is derived from the immediate environment. The advocates of this method typically make four basic assumptions regarding the child classified as learning disabled which, to a great extent, dictate the content of their educational intervention. These assumptions include: (1) that children who have learning problems are inherently disabled in some manner (e.g., auditory perception, visual perception, and psycholinguistic disturbances) and therefore are significantly different from "normal" children; (2) that reliable and valid diagnostic instruments are currently available which allow specific identification of the underlying disorder; (3) that once the internal process deficit has been identified, it is amenable to various remedial techniques which will result in generally improved functioning on the part of the child; and (4) tnat, as a consequence of appropriately applied remediational efforts, performance in listening, thinking, reading, writing, spelling and arithmetic will be greatly enhanced.

The actual educational procedures utilized by proponents of the process method are to initially administer a battery of tests which are designed to diagnose disturbances in the child's perceptual and/or psycholinguistic functioning. Measures frequently employed for this purpose include the Marianne Frostig Developmental Test of Visual Perception, Bender Visual-Motor Gestalt Test, Developmental Test of Visual-Motor Integration, Wepman Auditory Discrimination Test, Illinois Test of Psycholinguistic Abilities, Detroit Test of Learning Apitude, Purdue Perceptual Motor Survey, and the Roswell-Chall Auditory Blending Test. Based upon the obtained results of these tests and other devices, which have usually been administered by someone other than the learning disability specialist, a profile of the pupil's strengths and weaknesses is determined and an educational plan written. At this point, a remedial program is undertaken. It is presumably geared to improve the functioning of the recently diagnosed deficit area(s), to facilitate the continued development of the less severely damaged or normal processing areas, or to do both. Commercial programs commonly used by some specialists include the MWM Program for Developing Language Abilities (Minskoff, Wiseman, & Minskoff 1973), Sound Order Sense (Semel 1968), the Frostig Program for the Development of Visual Perception (Frostig & Horne 1964), and Aids to Psycholinguistic Teaching (Bush & Giles 1969). At or near the conclusion of the process training (which may extend from a few months to several years), the remedial program frequently will be expanded to include aspects of direct

189

academic intervention. This phase of training may be conducted by regular classroom teachers, other specialists in the school, or the learning specialist.

It is obvious that the principles and assumptions underlying process remediation still maintain considerable influence in the field. Indeed, from a historical perspective these procedures as now applied are only slight modifications of those recommended by Goldstein (1939), Strauss (1943), Strauss and Werner (1942), and Strauss and Lehtinen (1947). However, recent research has seriously questioned the effectiveness of this approach when applied to all children who are now designated as learning disabled. In general, these research findings have cast doubt upon whether commonly used process tests actually measure skills that are essential to academic achievement, and whether they possess the necessary power to differentiate between learning disabled and normal children or to accurately predict school success (Cohen 1969, Hammill & Larsen 1974b, Bryan 1974, Larsen & Hammill 1975, Newcomer & Hammill 1975, and Larsen, Rogers, & Sowell 1976). In addition, many of the training programs which are designed to remediate process deficiencies have been shown to be somewhat less than successful (Hammill 1972, Hammill & Wiederholt 1973, Goodman & Hammill 1973, Hammill & Larsen 1974a, and Larsen & Sowell 1975). As a result of these findings and simple disenchantment by some school personnel, this approach seems to be losing popularity in many parts of the country. According to Kirk and Elkins (1974), only 1-16% of the children being seen for instruction in Child Service Demonstration Centers were "... receiving major remedial assistance with processing skills" (p.22).

THE ACADEMIC METHOD. The second instructional approach frequently utilized for the child labeled as learning disabled focuses only on those behaviors which have caused the child to be considered somewhat different from his peers. With this method, there is no tacit assumption that the pupil is handicapped by some internal deficit. Rather, if a teacher reports that a child is underachieving in one or more subject areas — e.g., arithmetic, social studies, handwriting, etc. — instructional efforts are directed at diagnosing and reteaching the specific skills and subskills not yet mastered. This does not mean merely tutoring, using the same methods frequently employed in group instruction (which may have been the original cause of the failure). Frequent periods of intensive diagnostic teaching are employed to determine the specific techniques successful with individual children. This method is usually referred to as the "academic" or "behavioral" approach to instruction.

Learning disability specialists who utilize this approach reason: (1) that there is little evidence to indicate that the exact cause of a learning problem can be accurately determined, and even if it were possible, this knowledge would not significantly alter the academically orientated remediation; (2) that the majority of pupils now designated as learning disabled are referred to the specialist for primary academic deficits and any effective teaching strategy must stress the acquisition of those skills and subskills which relate directly to scholastic proficiency; (3)that until the pupil who is labeled learning disabled can adequately listen, read, write, spell, and perform mathematical computations (i.e., to perform satisfactorily in academic subject areas), participation in regular classroom activities will be extremely difficult;

(4) that since the vast majority of learning disability specialists are first and foremost trained teachers, their activities should be directed to those areas where they possess demonstrated competency. These teachers prefer not to deal with such multidefined and obscure constructs as "auditory-visual integration," "perceptual-motor," "spatial relations," and "figure-ground," but rather with observable difficulties in consonant blends, addition facts, formulation of capital letters, attention to task, etc.

Since most of the children labeled as learning disabled in the public schools are referred to the learning disability specialist from the regular classroom, advocates of the academic approach usually devote the first portion of their diagnostic process to interviewing the teacher in order to determine specifically why the child is experiencing difficulty in that environment. The interview process is frequently followed by a period of systematic observation in the classroom to validate the teacher's impressions and comments and to ascertain whether the problem is one of true academic retardation, disruptive behavior, poor pupil-teacher relationships, etc. The observational phase is also useful in guaging the possibility of conducting the remediation in that environment.

When necessary, the child is removed from the classroom for periods of diagnosis and remediation. This process involves the administration of various formal and informal assessment devices designed to pinpoint the academic or preacademic skills necessary for the child to achieve at grade level. In every case, the child's responses to specific tasks are carefully monitored and are considered more important educationally than the actual test score. For example, the KeyMath Diagnostic Arithmetic Test (Connolly, Natchman & Pritchett 1973) may be administered to a pupil who is having particular problems in mathematical computations. However discovering that the primary difficulty is in numeration would be more helpful than determining a mere grade equivalent score. Once the particular sequence of skills that have not been mastered has been determined, they are used as the basis of instruction. The specific subskills underlying each major skill are stated in behavioral terms, and this allows a step-by-step presentation of subject matter, and permits efficient evaluation of whether the child has indeed mastered the task. Contingency management systems are frequently employed to encourage maximum performance. As the child progresses through each skill cluster, it is hoped that he or she will gradually approximate grade level functioning. Proponents of this method attempt to facilitate carryover into the regular classroom of remedial work done in relatively isolated situations. It is assumed, that until the child is using his newly acquired skills in his normal environment, little real progress has actually been made. The final objective of all remedial efforts is to enable the child to function in the regular classroom as efficiently and effectively as possible.

These two instructional approaches do not operate as precisely as this presentation might indicate. In many cases, efforts are made to combine elements of both methods when planning for the child who is failing in school. However, there is a far greater tendency for proponents of the process method to include aspects of academic remediation than for academically oriented professionals to use components of perceptual and/or psycholinguistic instruction. This observation is supported by Kirk and Elkins (1974) who found that approximately 87% of the diagnosed learning disabled children were receiving primary assistance in the mastery of academic subject areas.

Regardless of which instructional strategies are used by the learning disability specialist, his or her responsibilities are the same. This person must (1) assume major responsibility in organizing and facilitating whatever educational intervention is deemed necessary for the child to perform adequately in school; (2) plan and conduct the diagnostic process where the pupil is either administered a battery of tests or given a short period of intensive diagnostic teaching to determine the areas that require in-depth remediation; (3) carry out, either alone or in conjunction with other professionals, the instructional program that has been designed to bring about improved school performance; and (4) maintain harmonious relationships with regular teachers to insure that the child is adequately supported when in the company of his achieving peers. The manner in which learning disability specialists fulfill these responsibilities will depend on the service delivery system which has been established in the individual school or district.

## SERVICE DELIVERY SYSTEMS

The most commonly employed service delivery systems used by learning disability specialists in the schools include the resource room, consulting teacher program, and self-contained classroom. Each of these instructional arrangements have relatively unique characteristics and may be applied in a wide variety of school settings. In many situations, aspects of all three systems have been instituted by larger school districts to allow maximum support for both the child with mild problems and the child with severe disorders. When first faced with the responsibility of initiating an educational program, the learning disability specialist must carefully analyze the unique characteristics of the children who are being referred and eventually labeled as learning disabled, the degree of active acceptance demonstrated by the school staff, and the specific objectives for the overall program that have been established by supervisors and administrators. Once the specialist has acquired this information, he or she is then able to effectively organize the instructional setting which will most adequately meet the needs of that individual school or system.

THE RESOURCE ROOM. Of the three service delivery systems, the resource room is undoubtedly the most popular. Essentially, a resource room is designed to provide the preferred form of educational remediation for specified periods of time and on a regularly scheduled basis. This arrangement allows the child to be maintained in the regular class (i.e., mainstreamed) for most of the time spent in school. In some instances, the resource room may be categorical in its operation. This means that only children who are diagnosed as learning disabled may be seen in this facility. School systems that use this type of resource room usually also will have specific rooms set aside for the mentally retarded and emotionally disturbed. In the past few years, however, most resource rooms have become cross-categorical in nature. This move has been precipitated by the fact that since the majority of children now placed in special education programs are very much alike in that they exhibit mild to moderate educational difficulties which are usually manifest in academic underachievement, common teaching strategies may be employed which will be beneficial to all.

Consequently, the learning disability specialists may find themselves working with pupils who are labeled as mentally retarded, emotionally disturbed, hard of hearing, cerebral palsied, educationally handicapped, etc.

The resource room has several qualities that make it particularly appealing to some educators. Its most prominent characteristic is adaptability. This instructional arrangement may be used as a center for short periods of diagnostic teaching as well as large portion of their daily instruction (most states require that a child cannont spend over 50% of his time in school within the resource room). The learning disability specialist functioning in this facility typically is permitted to be flexible in scheduling children for remedial instruction. As a result, there is little appreciable time lapse between the teacher's referral and the initiation of special services for the student.

While the resource room is, perhaps, the most frequently used form of special education, there is still little empirical evidence to indicate that it is substantially superior to alternative methods for all handicapped children. However, when applied judiciously with mild to moderate learning disabled children, there is little doubt that it will continue to be used as a major form of interfention for years to come.

TEACHER CONSULTANTS. This service delivery system is frequently utilized . The learning disability specialists assuming this role spend the majority of their instructional time within the regular classroom. Infrequently a child is removed for short periods for diagnosis and remediation. According to Newcomer (in press), the primary objective of the specialist functioning in this capacity is to "...provide the regular educator with the additional skills and competencies required to undertake such remedial activities independently, and to prevent certain problems from developing." In effect, both the regular teacher and the learning disability specialist are actively involved in planning and conducting educational strategies to overcome the learning problem. It is hoped that through the activities of this delivery system the general educational climate of the regular classroom will be improved and the teacher will have less need to consult the learning disability specialist in the future.

It is readily apparent that the teacher consultant approach will be applicable for only those pupils who exhibit mild learning problems or in situations where removal from the classroom is considered impractical. In cases where some children have significant problems and must be removed from the regular classroom for specified periods of times, the resource room may be used temporarily by the teacher consultant. In any event, the specialist will devote the majority of his or her time to the regular teacher rather than to providing direct remedial instruction to the child.

THE SELF-CONTAINED CLASSROOM. The learning disability specialist working in the self-contained classroom is responsible for the provision of instruction to a group of children on a full-day basis. Little or no effort is made to mainstream the learning disabled child in that all formal academic training is received from the specialist or other special education personnel. The child may spend anywhere from a few months to eight years in the typical self-contained class. The determinant of how long a child will be maintained in this situation will depend upon the severity of the problem and the extent to which it is remediable. The average number of pupils enrolled in a self-contained class at any one time will range from five to 15.

This type of instructional arrangement is reserved for more severely handicapped children. Children who are placed in the self-contained classroom exhibit such significant problems in the areas of language, academics, motivation, social skills, etc., that their unique needs cannot adequately be met using the teacher consultant or resource room. The learning disability specialist working in this capacity will usually devote large periods of time to the development and use of specialized curricula, equipment, and facilities needed to provide intensive and controlled instruction. The remedial techniques developed by Fernald (1943), Gillingham and Stillman (1936), McGinnis (1963), Lee (1974), Hewett (1968), Johnson and Myklebust (1968), and Cruickshank (1961), which are not necessary for the majority of children now labeled as learning disabled, are common strategies employed by the specialist in the self-contained classroom. The goal of this instruction is to provide a sound basis in the skills which are essential to effective learning. After the child has progressed to the point where a full support system is no longer necessary, placement in a less restrictive special education environment is frequently possible. Many children with severe learning disabilities can reach the educational and behavioral competence to be transferred.

To summarize, several service delivery systems are available. It is for the school administration, diagnosticians, and LD specialists to jointly determine which system or combination of systems will be most beneficial to the learning disabled children located in the district.

## EMERGING DIRECTIONS

It is apparent from the preceding sections that the field of learning disabilities is currently fraught with substantial controversy regarding the provision of optimal programs for children experiencing difficulties in school. While this situation is disquieting to some people, it would be incorrect to interpret honest and open differences of opinion as wholesale confusion or as a disinclination of professionals to deal with crucial issues. It is far more realistic to assume that the field is gradually passing through a period of turbulent self-assessment which will lead eventually to clearly delineated practices and procedures. The purpose of this section is to focus upon some trends which are clearly emerging in the field of learning disabilities and are likely precursors of what is to transpire during the next few years.

### MILD UNDERACHIEVEMENT VERSUS LEARNING DISABILITIES

The question of which children are to be included in the category of learning disabilities is fundamental to many of the problems currently confronting the field. It is becoming increasing apparent that, regardless of the rhetoric expended upon this topic, the tendency for some persons to label as many as 10-20% of the school population as learning disabled is patently unrealistic. At the same time, many informed state legislators will no longer permit the indiscriminate labeling of children who give no indication of suffering from a significant handicapping condition. This reaction by various governmental bodies is due, of course, to the continued shrinkage of monies generally available to education as well as the seeming inability of some school systems to be appropriately accountable for the results of programs which have identified excessive numbers of pupils as being learning disabled. In addition, the very real threat of potential court action has prompted many school administrators to assume a more judicious tactic when considering the placement of mildly underachieving children into special education.

It is now becoming obvious that both regular and special educators must seriously reconsider the concept of what constitutes "normal" learning and behavior. In situations where as many as 40% of all children in a school district are referred from regular classrooms for suspected learning disabilities and 15-20% are actually labeled, a significant breakdown in the educational system is manifestly apparent. Is it conceivable that such a large portion of a school population can be significantly handicapped by some internal problem which precludes normal achievement? It is far more likely that the vast majority of mildly underachieving children are simply poorly taught, unmotivated, dull-normal in intelligence, or come from environments where scholastic success is not highly valued. In all probability, these children should not be considered as learning disabled for the following reasons: (1) There is little evidence to indicate that placement in special education will necessarily result in improved academic functioning; (2) the etiology of the school failure is frequently viewed as residing within the child — a highly questionable assumption which may result in the use of inappropriate diagnostic and remedial strategies; (3) the responsibility for planning the modified educational program usually falls to the learning disability specialist, thus at least de-emphasizing the role of the regular educator in initiating or maintaining the remedial program; and (4) the increased emphasis upon providing services to the mildly underachieving child has undoubtedly resulted in a lessening of attention to the significant needs of the child who is truly learning disabled.

It is now common practice in some states to label no more than 3-5% of a given school population as learning disabled (e.g., Iowa and Kentucky). These percentages seem to be in concert with recent surveys which attempted to identify pupils with relatively severe problems. Much work remains to be done to solidify the criteria necessary for inclusion; however, the major elements revolve around extensive academic underachievement and evidence of an oral or written language disorder which seriously exacerbates the school failure. In addition, the problem cannot be due primarily to emotional disturbance, environmental deprivation, or below average intellingence. The use of such criteria will certainly tend to exclude those children whose mild scholastic failure may be remediated by modification of the regular classroom environment or curriculum. Corrective educational services, when needed will be provided by other specialists (eg., remedial reading and math teachers) within the school. Consequently, learning disability specialists will be able to direct the majority of their time to those pupils who exhibit more severe problems in achievement and/or language usage.

In summary, the trend toward labeling as learning disabled only those children who evidence pervasive learning problems appears to be gaining momentum. It is reasonable to assume that this practice will have a marked influence on diagnostic and remedial procedures as well as on the service delivery systems utilized to remediate the child's problems.

## INTERDISCIPLINARY RELATIONSHIPS

An unquestioned assumption underlying the provision of services to the learning disabled is that a "team" approach must be utilized when formulating and maintaining educational plans. A typical team may include the learning disability specialist, speech pathologist, school psychologist, physician, remedial reading teacher, social worker, and the school nurse. In some instances, the regular classroom teacher may also be asked to provide input to the proposed diagnosis and remedial program. Hopefully, each specialist on the team will have had an opportunity to work with the pupil prior to the diagnosis and before the parents are advised as to whether placement in special education is recommended.

While the inclusion of many specialists in the diagnosis and educational planning for the learning disabled has long been touted. I tend to view the unrestricted use of this practice with some skepticism. In many instances, the entire assessment phase is conducted by someone who is not a trained teacher and consequently, possesses little experience in actually managing a typical classroom. Frequently, potentially negative effects of the educational environment are not considered. In addition, the educational plan which is based upon this formal test-oriented diagnosis is often difficult for the teacher to effectively interpret and carry out in a meaningful fashion. In far too many cases, the plan is instructionally useless because of an excessive dwelling upon ill-defined physiological or psychological variables that are hypothesized either to cause or complicate the child's problem.

With the trend toward identifying only those learning disabled pupils who exhibit relatively severe academic and/or language problems, remedial reading teachers and speech pathologists may be able to provide relevant contributions regarding specific aspects of the observed problem. Historically, these two professional groups have contributed much information to understanding language disorders in adults as well as the educational management of disabled readers. How the learning disablilty specialist, remedial reading teacher, and speech pathologist can most efficiently cooperate to enhance the education of the learning disabled child and/or adolescent still remains to be determined.

It would seem that the most realistic way to determine which professional (or combination of professionals) is most qualified to deal with the various educational problems of the learning disabled is to devote more attention to what skills are required by a specialist rather than to the presumed competence of an individual based upon a job title. In other words, there is no evidence to indicate that any one of these specialists is more competent than any other one in the diagnosis and remediation of language disorders and academic problems in children. Each of these professionals could provide a seemingly convincing case that members of their particular group are the only ones who should be given responsibility for the management of specific problems — e.g., only the speech pathologist should work with language problems, only the learning disability specialist should work with significant academic problems, and only the remedial reading teacher should work with reading disorders. Such a position is fatuous, of course, and is simply indefensible.

The most reasonable approach for solving this issue is to clearly delimit the behavioral competencies needed by any professional to effectively remediate the various problems exhibited by the learning disabled pupil. A recent trend in this direction has been evidenced by initiation of a dialogue among the major professional groups representing learning disability specialists, remedial reading teachers, and speech pathologists. It is hoped that these agencies can, for the first time, conceptualize the learning disabled pupil from the standpoint of what specific skills are needed by professionals to maximize the possiblitiy of an education that is commensurate with ability. Once these competencies are highlighted, it will greatly alleviate any conflict regarding the territoriality of professional groups. Obviously, the person with the demonstrated skills corresponding to the needs of the pupil will take responsibility for carrying out an appropriate educational plan. It is apparent that until such competencies are defined and mutually agreed upon, dialogue between various professional groups will continue to focus upon obtuse theoretical concepts that have no real importance for children and adolescents who are suffering daily failure and frustration in the schools.

Without question, the field of learning disabilities is experiencing unprecedented modifications of its basic philosophical positions and educational practices. These shifts in position, while disconcerting to some, are prompting many professionals to review carefully their stands on various issues and to determine if they are still viable in light of current research and theory. This is an excellent indication that the field can rise to meet the needs of those pupils who are labeled learning disabled. In addition, positive leadership is now forthcoming from professional organizations rather than, as in the past, relying upon relatively impotent governmental agencies. With the continued meaningful cooperation of parents and various professional groups, no issue will be too monumental to be dealt with effectively. Practitioners in the field of learning disabilities may be encouraged by the statement of Alfred North Whitehead (1906):

> The last thing to be discovered in any science is what the science is really about. Men go on groping for centuries, guided by some dim instinct and a puzzled curiosity till at last some great truth is loosened. (p. 223)

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# REACHING THE "UNREACHABLE" CHILD

By Barry Kaufman

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"....Autism -- could the word forever limit the horizons of my son, and damn him to a deviant and sealed corner of our lives?..."

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> His little hands hold the plate delicately, his eyes surveying its smooth perimeter, and his mouth curls in delight. He is setting his stage. This is the beginning of his entry into the solitude that has become his world. Slowly, with a masterful hand, he places the edge of the plate on the floor, sets his body in a comfortable and balanced position, and snaps his wrist. The plate spins with dazzling perfection. It revolves on itself as if set in motion by some exacting machine. . . as indeed it was.
>
> This is not an isolated act, a mere aspect of some childhood fantasy. . . it is a great and skilled activity performed by a very little boy for a very great and expectant audience . . . himself.
>
> As the plate moves swiftly and spins hypnotically on its edge, he bends over it and stares squarely into its motion.
>
> For a moment, his body betrays a just-perceptible motion similar to the plate's. His eyes sparkle. He swoons in the playland that is himself. . . Raun Kahlil, our very "special" child. Seldom does he cry or utter tones of discomfort. His contentment and solitude seem to suggest a profound and inner peace. He is seventeen months old and seems to be comtemplating another dimension.

When Raun was one month old we had been warned of a possible hearing impairment after his hospitalization for a severe ear infection. As he grew, however, this seeming deficiency became compounded by his tendency to stare and become somewhat aloof. When he was one year old, we began noting audio insensitivity. Then inconsistencies developed. He could not hear a loud and sharp noise, but he would be attentive to some soft and distant sound. After repeated hospital examinations, we were informed that he could hear, but that his uncooperative and tangential behavior precluded proper diagnosis.

One afternoon when he was on the swing, I watched him with new eyes. I watched a child who I was now convinced could hear. Somehow, I knew he knew that he could make sense out of the sounds. He kept looking at me, through me. His eyes did not seem to absorb my image,but merely reflect it.

I began to understand. The rocking back and forth on the swing. The soft and gentle retreat to the outside perimeter of our world. The spinning and the fixed stare. The great agility and the fascination with inanimate objects. The self-stimulating smile and repetitious motion of his fingers against his lips. The excessive mouthing and drooling. The hours spent examining his fingers. The pushing away and the silent aloneness. When Raun turned to you, he turned through you as if you were transparent. And then there was absolutely no use of language. He was not just a slow talker -- he showed no communication by sound or gesture, no expression of wants, likes, or dislikes. Almost a year and a half . . . already an orphan set adrift in his own system.

The swing had become the spinning plate, merely a vehicle that facilitated his exquisite ride into a quietly personal and solitary universe.

I called and heard the echo in his valley. I laughed and caught the fantasy of an imagined smile. I spoke again. This time he turned his eyes toward me and for a fleeting and barely perceptible moment, we made contact. Then he was gone again. Blond hair in Shirley Temple ringlets, large brown riveted eyes, and the mirror of me.

A word appeared like a neon sign on the surface of my thoughts. A label. Confusing, frightening, bizarre.

Autism . . . infantile autism. A subcategory of childhood schizophrenia . . . the most irreversible category of the profoundly disturbed and psychotic. Could the word destroy a dream, forever limit the horizons of my son and damn him to a deviant and sealed corner of our lives?

That evening my wife and I explored and researched the subject. We pulled out the old psychology books with their scribbled messages from another era. We pulled new books from the library. Finally, we had it. Leo Kanner labeled the affliction first, in 1943. Others expanded the initial criterion, and a constellation of symptoms were recorded. Autism is an illness not defined by origin or causality, but by a collection of associated symptoms.

The categories: antisocial and aloof patterns of behavior; hypnotic preoccupation with spinning, rocking, and repetitive movements; noncommunication verbally and sometimes no prelinguistic gesture language; the appearance of looking through people; fascination with inanimate objects; no anticipatory gestures when being approached or picked up; often seems deaf, unresponsive, and self-stimulating; desiring sameness and pushing off from physical contact. Generally, for no specific reason, autistic children are physically attractive. Thirty years ago Kanner had described our infant son. Raun fit every category with the exception of being self-destructive (banging his head, etc.).

My wife, Suzi, and I searched each other for reactions. We explored our fears, the feeling of despair, and the seeming enormity of our discovery. We would try to make it okay. We would make it through. If Raun was autistic, we would help him. We would, together with his sisters, Bryn, eight, and Thea, five, find a way.

The literature argued against our mood. The literature talked about the child who is noncommunicative and most often slips behind a veil of his own solitude. In Bruno Bettelheim's The Empty Fortress, the doctor describes autism as trauma and articulates the pessimistic results of his studies. The overwhelming percentage of these children are hospitalized and confined with custodial care for their entire lives. Their personalities disintegrate (or never develop), and the family environments often crumble. Bettelheim had reached only a few of these children, and even they had shown limited communicative and adaptive abilities.

We wanted to stay free of fearing the future so that we could understand what was happening to us and to our child. Research. Jump into the pit. When we were ready, we would have our hypothesis confirmed or denied by professionals in the field of psychiatry and child development.

Suzi and the endless telephone conversations.

He is too young. We never see them so young . . . . Go here . . . . Go there. Hopeless . . . . Great, what we really want is to get them young. Give him a full psychiatric evaluation . . . . Testing . . . . He'll need a neurological work-up and EEG . . . . Give him the brain scan . . . . It is a waste, he's too young. Bring him in in a year.

The talks with doctors and hospitals in and around New York City. An institute in Philadelphia specializing in brain-damaged and autistic children. A specialized environmental school in Brooklyn and one in Nassau County which will not see him until he is much older. A dedicated specialist in behaviorism in California with a major university and federal grant to study and research autism. Psychopharmacology. Psychoanalysis. Behaviorism. Vitamin therapy. Nutritional analysis. The C.N.S. factor. Genetic therapy. Endless viewpoints. Endless opinions and nonopinions. Little real knowledge because of little real success after 30 years of work with autism.

As Suzi's informational grip spread out over the country, I withdrew into my hermitage to read everything available on the subject. Delacato and his concepts of patterning and sensory impairment. The Divine Disease. More Bettelheim and his psychoanalytical themes. Kugelmass. The articulate and incisive Rimland. Kozloff and operant conditioning. Lovaas and the last resort. Back to Skinner and Freud. The mountain of writing was endless and contradictory. Observations, statistics, and speculation. We tried to pull it together, to make sense out of the miasma of volumes and lengthy telephone conversations. We were trying to synthesize a direction.

We decided to have an examination and work-up done on Raun. We had to plunge in somewhere, but at least now we felt more knowledgeable. First, an interview and an analysis at a major institution with a highly renowned psychiatric division. They confirmed that our son showed serious developmental problems and bizarre autistic behavior patterns, but they did not want to label him. Come back in a year, they said, and good luck. We were angry . . . . disappointed. We wanted help, not abstract diagnosis.

Another hospital, two more work-ups, and then the word autism was used. Again, the doctors expressed their amazement that we were able to detect the strange behavior and autistic symptoms in a child so young. Usually such signs are not recognized before children are two or three years old. The doctors suggested we return in nine months. Why nine months? Because their affiliated facilities could not deal with a child so young. We received no concrete help (a child is normally four or five years old before he is given any professional help), but our diagnosis was again confirmed.

The letdown. To suggest that the earlier you get this type of child, the better, and then to turn the child away because he is too young, seemed cruel and self-defeating. Depressing statistics or depressing attitudes? Why should doctors rush if they believe that autism is incurable?

He was already seventeen months old. Each day, Raun was becoming more insensitive to audio and visual stimuli, more encapsulated. If he was to be reached it would have to be done now. Now, while he was young. Now, while he was still happy in his infantile playland. And it would have to be done by us.

But where to begin? With ourselves. For years, we both had been exploring the system of beliefs that underlies our feelings, wants, and behavior . . . our happiness. We call this the Option Method (originated by Bruce DiMarsico). It is an educational counseling technique and therapy that is born out of an attitude of acceptance . . . "to love is to be happy with."

This attitude would be the place to begin with Raun. No judgments. No conditions. No expectations. He did not need another doctor or interviewer. He needed a guide, a teacher, a therapist. "Therapon," the Greek genesis of the word therapist, means "a comrade in a common struggle."

We decided to institute a two-phase program with our attitude of approval and acceptance to underlie every activity. First, a motivational/therapy teaching experience. Show Raun that our world was beautiful and exciting. Show him that it might be worth the extra effort to depart from his ritualized arena. We knew that the movement would have to come from him. We could only provide the increased awareness and the opportunity.

His "isms" (the lengthy repetitive behavior patterns such as rocking, spinning, etc.) would be openly accepted. Perhaps his "isms" were simply his healthy way of coping with and making sense out of a complex and bizarre confusion of perceptions.

Secondly, we wanted to develop a program of instruction for him. We would grossly simplify his external environment in order to let him build new pathways where old ones may have been damaged or broken. For us, autism was not a subcategory of an emotional maladjustment. It was probably more precisely a brain or neurological dysfunction primarily of a cognitive nature. His deviance was his way of seeing and digesting the environment. We would not burden him with expectations. We did not want to create the serious emotional problems which are so often an outgrowth of autism.

The bathroom. We would begin in the bathroom, the least distracting environment in the house. We would begin on the tile floor between the toilet and the tub.

We initiated the sessions with a series of games and interpersonal activities. Encouraged him to be attentive to us. Total overstimulation. Even outside of this bizarre teaching environment, Raun was bombarded with sensory and verbal stimuli. At no time was he left alone. We hired two sensitive and perceptive high school students and trained them to work with Raun also. Together they put in about 25 hours per week and Suzi put in about 45 intensive hours. This was supplemented by hours of free-flowing sessions between Raun and our daughters. Each one had her times to play with him in ways geared to reinforce his more structured work sessions.

Always, we watched him . . . showed him the choices and opportunities, and then waited. At first he hardly reacted. Then he participated on a very minimal basis. Loving, stroking, tickling, peek-a-boo, ball-playing, trips to new places, insertion toys, puzzles, building blocks, much chatter and pointing, sensory stimulation through touch and sounds, music, body-awareness techniques -- merely simple interactions for a normal year-old child -- were confounding and complex experiences for Raun. He still enjoyed the solutide of his "isms." He was very quick at what he initiated or with some special things, but he had extreme difficulty digesting new things that originated outside of him.

Imitation of Raun became a central theme in our house and an important backdrop of our program. We were showing him that he could, with minimal effort, move the world outside of him, to effect change and control. He could manipulate people to get what he wanted.

When Raun would spin for hours in a room, Suzi and I and whoever else was in the house would gather up plates and pans and spin beside him. Sometimes, there would be as many as five of us imitating him and turning his "ism" into a communal event. For the first several days, he ignored us. Then he seemed to quietly watch us from the corners of his eyes. Finally, he began to express annoyance at us for joining him and invading his private kingdom. We had broken through.

At the dinner table, when Raun would bang on the table, we would all imitate him. When Raun would shake his head, we all would. When Raun would smile or stick his tongue out, we all would. For weeks, he watched us, fascinated. Once he realized that he was in control, "Simon Says" became the order of the day. We banged, we laughed, we enjoyed each other. Raun was with us, more and more now.

Eight weeks had elapsed. Beautiful. Difficult. Frustrating. But there was progress. For another child, Raun's accomplishments might merely be the new lesson learned in a day. And yet, Raun's struggle and risk-taking, his daring to be with us, were profoundly heroic. The little boy who had looked through people would now smile at them. The deaf one was attentive to someone calling his name. The recluse was now active and participating. Our "special" child was having more fun with himself and with us. He was finding ways to piece the world together and make sense out of his perceptions.

What follow are excerpts of a condensed log charting the movement that took place from the eighth through the twenty-second week of the program.

## Log: The Eighth Week

### Changes:

Less rocking, less fixation on hands.
Real eye contact.
Attentive to being called.
Expression of anger and frustration.
Follows some people around.
Seems to be indicating by crying.
Casual mimicking of words.
Listens to sounds.
Some language on receptive basis.
First time anticipatory gestures
Starting to drink out of glass.
Beginning to feed himself soft foods.

### No Changes:

Still prefers objects to people.
Still excessive spinning and staring.
Pushing away from physical contact.
Does not express what he wants.
Throws everything.
Does not cry to get out of crib or eat.

### Observations:

Difficulty eating, chokes on solids.
When something he wants is hidden or placed behind another object, he stops wanting it, as if when he can no longer see it, it does not exist.
Special desire for liquids.
Does not like behavior techniques.
Found himself in mirror and explored his image.

## Log: The Eleventh Week

### Changes:

Much better eye contact.
No more fixating on his hands.
Expressing wants by crying and pulling someone's hand; goes after water and cookies but only when in view.
Listens to verbal language.
More interest in interpersonal games.
Possessive of some objects.
Drinks out of a glass by himself.
Enjoys exploring himself in mirror.

Starting to point at or near things he wants.
More expression of anger.
Starting to enjoy other children.
Definitely no longer wants you to imitate his "isms."
Enjoys experimenting on piano.
Shows understanding of language.
More repeating of words in exercises.
Plays with puzzles.
Eats solid foods without choking.

No Changes:

Still prefers to be alone.
Still much spinning and rocking.
Does not cry to eat or get out of crib.
Does not use verbal language.
Throws things.
Excessive dribbling from mouth.

Observations:

First time, went after an object notimmediately in view.
First time, frightened by new person entering room.
Raun ran to Suzi, and kept holding her leg.
Imitating more physical acts.
Always more positive when he initiates.

## Log: The Fourteenth Week

Observations:

Established excellent eye contact.
Interacts with family members.
Has begun to play with toys.
Is listening more attentively and now has started to mimic.
Hums to himself.
Imitative speech is strange in pitch and erratic.
Understands more language, responsive to words and commands.
Now goes to sink and cries to indicate he wants a drink or or he wants to eat.
No more looking at his hands.
Very interested in games.
Follows people in and out of rooms.
Solicits physical contact and enjoys it.
Banging and now pointing at things.
Will take your hand.
Expressing anger.

Notes: Hurrah! Possible first use of effective language today . . . said the following words without first hearing them and using them in a meaningful way -- "down," "ba" for bottle, "wa" for water, and "more."

Singing a special tune now. Spinning and choosing to be by himself when he can.

## Log: The Seventeenth Week

Observations:

Moods have become more erratic now and somewhat unpredictable . . .
Sometimes plays and works well; sometimes very uncooperative.
Reinstituted some of the old rocking, staring, and deafness "isms."
Less mimicking and no effective use of language.
Again avoiding physical contact.
Turning over furniture and becoming a bit destructive.

## Log: The Eighteenth Week

Observations:

Raun's uncooperativeness and crying have expanded into almost every waking hour. His interaction is limited and our program is almost nonfunctional. After having him checked physically for any ailments, we thought it important to allow him these expressions and the withdrawal. He seemed to be going through a strange and melancholy dialogue with himself, as if he were deciding whether to stay with his present accomplishments or push ahead into an even more unknown and, perhaps, difficult world.

## Log: The Nineteenth Week

Observations:

Incredible -- Raun has moved through it. This morning he awoke cheerful and started to make a greater effort to talk . . . seeking approval and being excited with himself. He did not confine himself to the five words that he had learned over the past several weeks. He was now responding verbally to the images and words that had been very carefully and repetitiously presented to him over the last fourteen weeks. He could now put it together. His vocabulary expanded from five words to 75 in one week.

Further Observations:

Attentive to people again and excellent interaction with family members.

Growing fascination with letters.
Beginning to eat with a spoon.
Enjoys doing puzzles by himself.
Move involvement with music.
Referred to himself as "me."
Strange use of tongue and dribbling.

Still moving forward at a fantastic pace. The end of the twenty-second week. Now language used in a meaningful and consistent manner. Raun is through the barrier of his own encapsulation. He has found new pathways, opened new channels, and now addresses our world. Only five short months. In his last professional evaluation, only three months ago, Raun was said to have the social maturity and language skill of an eight-month-old infant. He was said to have shown dramatic delays in the milestones of development which could possibly lead to total retardation.

Now Raun functions almost at his 22-month-old level. He has made a fourteen-month surge forward in only three months' time. His grasp and acquisition of language opens a new chapter in the possibilities of his growth and accomplishments.

The story of Raun . . . . The smile of Raun. The voice of Raun. The sensitivity of Raun. The autistic systems have faded, but not disappeared. This has been his journey toward our world.

Several weeks ago, Suzi, Raun, and I were in the waiting room of a children's center to have an update on Raun. As we sat there in the lobby, a little girl and her mother came walking past. The little girl broke away from her mother and ran directly to Suzi. Eyes were teal blue and razor sharp. Suzi stroked her face softly and began to talk quietly to her. The child stared into Suzi's eyes and touched her head to Suzi's. They were like two old friends saying hello on the stone floor. The mother then came over and directed her child to the door. All the time, the little girl kept looking back at Suzi.

We inquired about this child. We were told that she was autistic, a patient whom they were having no success with because of her decisive disinterest in people. Perhaps she understood that Suzi loved her and respected her specialness. Perhaps, when an attitude is so much a part of someone, verbal communication is totally unnecessary.

Little Girl Blue and Raun Kahlil. There is no real place for them. They're so young and so adrift. They are dealt with en masse, statistically. They are pushed into programs that come from heavy theoretical viewpoints. They are pulled instead of followed. The heartache. The lifetime incarceration. The fortune of money expended for custodial care. The wasted energy. For Raun there are continued evolving horizons. This could be a beginning in which others could share. . .if they are recognized very early before their disabilities create an emotional shell that becomes impregnable.

Autism could be a learning tree. These special little people can be reached, and Raun Kahlil could become a mover and teacher for us all.

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# SECTION V

# STATE DUE PROCESS PROCEDURES

# A PRIMER ON DUE PROCESS

## Due Process of Law

### Background and Intent

> Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function partly...because it was thought children had few rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not to enforce rights, on the assumption that the former could be done without the latter. (Rodham, 1973, p. 506)

With the conflict between safeguarding interests and assuring individual rights as a backdrop, the rights of children in many areas of American life are being examined and clarified, often through judicial intervention. Nowhere is this examination more intense than in public education. In this decade, questions of "rights" for public school students have been raised in relation to freedom of expression, personal rights such as hair length and dress regulations, marriage and pregnancy, police intervention, corporal punishment, discipline, and confidentiality of records. While all of these have an impact on handicapped children, none is more pervasive than the right to due process which governs decisions regarding identification, evaluation, and educational placement.

### Children Out of School

In years past, prior to clarification of the due process obligations of public schools, thousands of children were arbitrarily suspended, excluded, pushed out of school or prevented from enrolling. Based on its analysis of 1970 US Bureau of the Census data on nonenrollment, the Children's Defense Fund (CDF) reported that "nearly two million children 7 to 17 years of age were not enrolled in school" (CDF, 1974). CDF postulated that the two million nonenrolled figure only "reflects the surface" of the total number. While no specific data is presently available on the precise number of handicapped children not receiving an education, it is well known that many are excluded from school. Indicative is the following CDF observation.

> We found that if a child is white but not middle class, does not speak English, is poor, needs special help with seeing, hearing, walking, reading, learning,

> adjusting, growing up, is pregnant or married at age 15, is not smart enough or is too smart, then, in too many places school officials decide school is not the place for that child. In sum, out of school children share a common characteristic of differentness by virtue of race, income, physical, mental or emotional "handicap," and age. They are, for the most part, out of school not be choice but because they have been excluded. It is as if many school officials have decided that certain groups of children are beyond their responsibility and are expendable. Not only do they exclude these children, they frequently do so arbitrarily, discriminatorily, and with impunity. (CDF, 1974, pp. 3-4).

## Exclusion and the Right to an Education

Much litigation recently has been concerned with handicapped children seeking affirmation of their right to an education and the protection of due process of law (Abeson & Bolick, 1974). This wave of litigation is evidence of the way in which public schools in the past often ignored appropriate legal processes in denying these children their rights. The public schools often based such action upon law which was interpreted to give them the right to deny the opportunity of a public education to some children, either on a short term or permanent basis.

Today, it is a matter of public policy that the purported purpose of the public school is to provide every child with the opportunity for a free, public, and appropriate education.This policy makes it clear that to solve the problems a child is having in school by excluding him is not to solve the problems of the child, but of the school. It is unreasonable for the public schools to expel a child because of a behavioral problem (more popularly known as a discipline problem), an inability to learn, or any handicapping condition. The language of the courts is well known in the face of such abuses:

> There is no question that the plaintiff will suffer irreparable harm if her school career is permanently terminated and this may well result if her indefinite expulsion continues. . . . No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens. (Cook v. Edwards, 1972).

> A sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penalty, the ultimate punishment. . . . Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship (Lee v. Macon County Board of Education, 1974).

> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (Brown v. Board of Education, 1954).

> The Court declares that it is the established policy of the State of Maryland to provide a free education to all persons between the ages of five and twenty years, and this includes children with handicaps, and particularly mentally retarded children, regardless of how severely and profoundly retarded they may be. (Maryland Association for Retarded Children v. State of Maryland, 1974).

Prior to 1971 and the clear directives provided by the courts (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 1971; Mills v. Board of Education of the District of Columbia, 1972; the Maryland case cited above; and others), some school exclusion was based on existing law and was in many quarters considered legal and appropriate. Typical were state statutes containing provisions for excluding children with physical or mental conditions or attitudes that prevented or rendered inadvisable their attendance at school or application to study. Often such provisions excluded children who were blind, "dumb," or "feebleminded" for whom no adequate instructional programs had been provided and children who lived more than a minimum distance from a public school or on a route on which no transportation was provided by school authorities.

The rationale that perhaps partially explains the existence of such statutes is represented by a 1919 ruling of the Wisconsin Supreme Court. That ruling provided for the exclusion of a non-physically-threatening cerebral palsied child on the basis that his "condition" produced a "depressing and nauseating effect on the teachers and school children and that he required an undue portion of the teacher's time" (Beattie v. State Board of Education, 1919).

Statutory provisions such as those indicated above sanctioned only the most obvious exclusion. Other more subtle devices have been and are today being used to accomplish similar objectives. An example is the use of tuition grant programs in most states, which enable the state and/or local education agency to provide public funds to parents for the purchase of private education programs (Trudeau & Nye, 1973a). Most often, such payments may be provided only when appropriate public programs are not available. These policies have the potential for wealth discrimination and exclusion because frequently a dollar ceiling insufficient to cover the cost of private tuition is placed on the amount of public funds that can be made available. If the family is unable to pay the difference, the child is subject to exclusion or inappropriate placement.

The right to education principle makes clear that when a state undertakes to provide education for any child and does so through the use of public or private programs as a matter of public policy, then the state must assume full financial responsibility for all children. This position has been clearly articulated in the order in Maryland Association for Retarded Children v. State of Maryland (1974). A series of decisions in New York Family Court also supported the right of every child to a free public appropriate education. Notable is In Re Downey (1973), in which the court stated that "to order a parent to contribute to the education of his handicapped child when free education is supplied to all other children would be a denial of the constitutional right of equal protection, United States Constitution, Amendment XIV, New York State Constitution Article XI, Section 1." Similarly in In Re K. (1973), the court held:

> It would be a denial of the right of equal protection and morally inequitable not to reimburse the parents of a handicapped child for monies they have advanced in order that their child may attend a private school for the handicapped when no public facilities were available while other children who are more fortunate can attend public schools without paying tuition and without regard to the assets and income of their parents.

Another practice used to exclude handicapped children occurs as a function of limited program alternatives. For example, in some states, children who need homebound or hospitalized instruction do not receive these services because they are not provided for by law. In other states children are placed on home instruction but then are provided no services or insufficient services to meet the standard of an appropriate public education. Frequently, children who are being considered for special education are assigned to waiting lists prior to an evaluation which is required by law before a special assignment can be made. Unfortunately, these children often wait at home rather than in school, and often for unnecessarily lengthy periods of time.

## Labeling and Mislabeling -- Classification and Misclassification

Regardless of the types of exclusion that have been used and regardless of where they have occurred, the common denominator is that such practices have usually occurred with little or no regard for due process of law. The same observation can be made with regard to the manner in which children are placed in educational programs other than those provided for nonhandicapped children. Other practices associated with placement decisions include identification and evaluation that occur when school personnel suspect that a child may be handicapped and in need of a special program. In ignoring due process, the schools have in many instances, with or without appropriate supporting data, assigned labels to children, subjected children to individual psychological assessment, and altered their education status without parental knowledge or permission. The following, taken from a letter written to one of the authors, aptly describes the problem:

> Harris, my only son, is ten and is somewhat small for his age but has always been very active, playing with friends in his neighborhood. Last spring I got a note asking me to come to school. The pupil adjustment counselor told me that Harris and another boy, who had once been his friend, had been fighting and that Harris was not to return to school for a week. When he returned to school he was immediately sent home again for no specific length of time, but with the message that he couldn't return again until he "learns to behave." When I again went to school to see his teacher, I learned that Harris had been placed in a class for retarded children since last year. I became very upset because I had never been told of this. I did get a note from someone last year saying that Harris was receiving some special help with his studies, but it said nothing about a class for retarded children.

It is well known that labeling in and of itself, even when done carefully and with good intent, may produce negative effects on children. There can be no justification for unnecessarily submitting children to such effects. Three of the major problems associated with labeling practices are:

1. Labeled children often become victimized by stigma associated with a label. This may be manifested by isolation from usual school opportunities and taunting and rejection by both children and school personnel.

2. Assigning a label to a child often suggests to those working with him that the child's behavior should conform to the stereotyped behavioral expectations associated with the label. This often contributes to a self fulfilling prophecy in that the child, once labeled, is expected to conform to the stereotyped behavior associated with the label and ultimately does so. When a child is labeled and placement is made on the basis of that label, there is often no opportunity to escape from either the label or the placement.

3. Children who are labeled and placed on the basis of that label may often not need special education programs. This is obviously true for children who are incorrectly labeled but it also applies to children with certain handicaps, often of a physical nature. Just because a child is physically handicapped does not mean that a special education is required.

Decisions to label a child, even in his best interest, have grave consequences. Mercer (1975) quoted Alfred Binet's early concern about labeling practices and stigmatization resulting from such practices: "It will never be to one's credit to have attended a special school. We should at the least spare from this mark those who do not deserve it. Mistakes are excusable, especially at the beginning." Mercer added that "we are no longer at the 'beginning' in psychological assessment. 'Mistakes' are no longer excusable. We believe that children have a right to be free of stigmatizing labels" (p.140).

Hobbs (1975) put the total issue into perspective. "Categories and labels are powerful instruments for social regulation and control, and they are often employed for obscure, covert, or hurtful purposes: to degrade people, to deny them access to opportunity, to exclude undesirables whose presence in some way offends, disturbs familiar custom, or demands extraordinary effort" (p. 11).

Among the responses to the many challenges that have been directed at labeling and associated practices have been laws passed at both the state and federal levels establishing controls on such practices. In California, for example, state law specifies the type of evaluation to be used for children suspected of being mentally retarded. It also establishes specific standards which must be met prior to proclaiming a child mentally retarded (California Education Code, Sec. 6902.085). To specifically guard against the now widely recognized problem of penalizing children through the use of psychological instruments totally inappropriate to their culture, the Federal Education Amendments of 1974 (Public Law 93-380) require that state plans for the education of handicapped children will "contain procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory" (Sec. 612, (13) (c)).

As has been indicated, there is widespread criticism, both formal and informal, as to the evils of labeling and the associated practices of misclassification and misplacement. While it is true that labeling may produce negative effects, these effects can be eliminated or reduced by better professional practices. The intent of placing a label on a child in the first place is to obtain special benefits for that child; it is not to single the child out for abuse, ridicule, or nonservice. Hobbs (1975) in the report of the massive Project on Classification of Exceptional Children, concluded:

> Classification of exceptional children is essential to get services for them, to plan and organize helping programs, and to determine the outcomes of the intervention efforts. We do not concur with sentiments widely expressed that classification of exceptional children should be done away with. Although we understand that some people advocate the elimination of classification in order to get rid of its harmful effects, their proposed solution oversimplifies the problem. Classification and labeling are essential to human communication and problem solving; without categories and concept designators, all complex communicating and thinking stop. (p. 5).

The dilemma is well summarized by Hobbs, who indicated that:

> Children who are categorized and labeled as different may be permanently stigmatized, rejected by adults and other children, and excluded from opportunities essential for their full and healthy development. Yet categorization is necessary to open doors to opportunity: To get help for a child, to write legislation, to appropriate funds, to design service programs. to evaluate outcomes, to conduct research, even to communicate about the problems of the exceptional child. (p. 3).

If one accepts Hobbs' conclusion that labeling and classification practices must continue, then equally important is acceptance of the critical relationship of due process. Given the positive and negative effects that can accrue to a labeled and classified individual, safeguards must be established to control these practices. Due process offers the potential for such a sfaeguard. Adherence to due process will reduce unnecessary labeling and classification and will contribute to delivery of the specialized services needed by children with special learning needs. Emphasizing the provision of due process to children suspected of being exceptional and in need of special education services is in part an attempt to build an effective review and control mechanism to guard against improper labeling and classification practices.

## Due Process

### The PARC Consent Agreement

Due process requirements of the public schools were first, and perhaps most clearly, established in the Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania Consent Agreement. Prior to ruling on the question of each mentally retarded child's right to an education, the court approved a stipulation which provided that "no child who is mentally retarded or thought to be mentally retarded can be assigned initially or reassigned to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer (PARC Consent Agreement, 1972). As part of that order a 23 step procedure was established guaranteeing due process, including a hearing, as indicated below:

> Whenever any mentally retarded or allegedly mentally retarded child, aged five years, six months, through twenty-one years, is recommended for a change in educational status by a school district, intermediate unit or any school official, notice of the proposed action shall first be given to the parent or guardian of the child.
>
> Notice of the proposed action shall be given in writing by registered mail to the parent or guardian of the child (N.B. being changed to certified mail).

The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed.

The notice shall advise the parent or guardian of any alternative education opportunities, if any, available to his child other than that proposed.

The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.

The notice shall inform the parent or guardian of his right to be represented at the hearing by legal counsel, of his right to counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological, and educational testimony, and of his right to confront and to cross-examine any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.

The notice shall inform the parent or guardian of the availability of various organizations, including the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall offer to provide full information about such organization to such parent or guardian upon request.

The notice shall inform the parent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological, and educational evaluation of his child and shall specify the name, address, and telephone number of the MH-MR center in his catchment area.

The notice shall specify the procedure for pursuing a hearing, which procedure shall be stated in a form to be agreed upon by counsel, which form shall distinctly state that the parent or guardian must fill in the form and mail the same to the school district or intermediate unit involved within 14 days of the date of notice.

If the parent or guardian does not exercise his right to a hearing by mailing in the form requesting a hearing within 14 days of receipt of the aforesaid notice, the school district or intermediate unit involved shall send out a second notice in the manner prescribed above, which notice shall also distinctly advise the parent or guardian that he has a right to a hearing as prescribed above, that he had been notified once before about such right to a hearing and that his failure to respond to the second notice within 14 days of the date thereof will constitute his waiver to a right to a hearing. Such second notice shall also be accompanied with a form for requesting a hearing of the type specified above.

The hearing shall be scheduled not sooner than 20 days nor later than 45 days after receipt of the request for a hearing from the parent or guardian.

The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child. At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.

The hearing officer shall be the Secretary of Education, or his designee, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.

The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

The local school district or intermediate unit shall have the burden of proof.

A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.

The parent or guardian or his counsel shall be given reasonable hearing by legal counsel of his choosing.

The parent or guardian or his counsel shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit concerning his child, including any tests or reports upon which the proposed action may be based.

> The parent or guardian or his counsel shall have the right to compel the attendance of, to confront and to cross-examine any witness testifying for the school board of intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.
>
> The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.
>
> No later than 30 days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his counsel.
>
> Pending the hearing the receipt of notification of the decision by the parent or guardian, there shall be no change in the child's educational status.

While the PARC order was limited to the mentally retarded, in the subsequent mills (1972) decision the court ordered implementation of due process procedures closely comparable to the PARC requirements, but including all handicapped children.

### The Tennessee Law

Shortly after the decisions in the early right to education cases were delivered, provisions for due process began to appear in both state and federal statutes. Among the first was Tennessee's 1972 special education law (Tennessee Code Annotated, Chapter 839, 1972) which contained the following section:

> SECTION 8. A. 1. A child, or his parent or guardian, may obtain review of an action or omission by state or local authorities on the ground that the child has been or is about to be:
>
> a. denied entry or continuance in a program of special education appropriate to his condition and needs.
>
> b. placed in a special education program which is inappropriate to his condition and needs.
>
> c. denied educational services because no suitable program of education or related services is maintained.
>
> d. provided with special education or other education which is insufficient in quantity to satisfy the requirements of law.

e. provided with special education or other education to which he is entitled only by units of government or in situations which are not those having the primary responsibility for providing the services in question.

f. assigned to a program of special education when he is not handicapped.

2. The parent or guardian of a child placed or denied placement in a program of special education shall be notified promptly, by registered certified mail, return receipt requested, of such placement, denial or impending placement or denial. Such notice shall contain a statement informing the parent or guardian that he is entitled to review of the determination and of the procedure for obtaining such review.

3. The notice shall contain the information that a hearing may be had, upon written request, no less than fifteen (15) days nor more than thirty (30) days from the date on which the notice was received.

4. No change in the program assignment or status of a handicapped child shall be made within the period afforded the parent or guardian to request a hearing, which period shall not be less than fourteen (14) days, except that such change may be made with the written consent of the parent or guardian. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be sooner made, but without prejudice to any rights that the child and his parent or guardian may have pursuant to this subsection or otherwise pursuant to law.

5. The parent or guardian shall have access to any reports, records, clinical evaluations or other materials upon which the determination to be reviewed was wholly or partially based or which could reasonably have a bearing on the correctness of the determination of any hearing held pursuant to this section, the child and his parent or guardian shall be entitled to examine and cross-examine witnesses, to introduce evidence, to appear in person, and to be represented by counsel. A full record of the hearing shall be made and kept, including a transcript thereof if requested by the parent or guardian.

6. A parent or guardian, if he believes the diagnosis or evaluation of his child as shown in the records made available to him pursuant to subsection 5 of this subsection to be in error, may request an independent examination and evaluation of the child and shall have the right to secure the same and to have the report

thereof presented as evidence in the proceeding. If the parent or guardian is financially unable to afford an independent examination or evaluation, it shall be provided at state expense.

7. The state board of education shall make and, from time to time, may amend or revise rules and regulations for the conduct of hearings authorized by this subsection and otherwise for the implementation of its purpose. Among other things, such rules and regulations shall require that the hearing officer or board be a person or composed of persons other than those who participated in the action or who are responsible for the omission being complained of; fix the qualifications of the hearing officers; and provide that the hearing officer or board shall have authority to affirm, reverse or modify the action previously taken and to order the taking of appropriate action. The rules and regulations shall govern proceedings pursuant to this subsection whether held by the State Board of Education, or by a County, City, or Special School District Board of Education.

8. The determination of a hearing officer or board shall be subject to judicial review in the manner provided for judicial review of determinations of the state or local education agency, as the case may be.

9. If a determination of a hearing officer or board is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the chancery or circuit court. Any action pursuant to this subsection shall not be a bar to any administrative or judicial proceeding by or at the instance of the State Department of Education to secure compliance or otherwise to secure proper administration of laws and regulations relating to the provision of regular or special education.

10. The remedies provided by this subsection are in addition to any other remedies which a child, his parent or guardian may otherwise have pursuant to law.

B. Nothing in this Act shall be construed to limit any right which any child or his parent or guardian may have to enforce the provision of any regular or special educational service, nor shall the time at which school districts are required to submit plans or proceed with implementation of special education programs be taken as authorizing any delay in the provision of education or related services to which a child may otherwise be entitled.

## The Massachusetts Law

In that same year the Massachusetts legislature also enacted a new special education statute (Massachusetts Law, Chapter 766, 1972), containing the following due process provisions:

> SECTION 3. In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.
>
> No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency, or through any other program which is approved for the child by the department.
>
> No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.
>
> Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.
>
> Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by

a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires of a (sic) medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available in accordance with regulations promulgated jointly by the departments of education, mental health, public health and public welfare in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health, or at private expense from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parent, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians, or person with custody reject this determination they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents,

> guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

## Public Law 98-380

By October 1, 1974, a survey of state policies regarding due process was completed by the State-Federal Information Clearinghouse for Exceptional Children (SFICEC, 1974). The survey revealed that 12 states were required by statute to provide such procedures, 13 were similarly required by regulation, and the remainder had no policy mandate. This situation will undoubtedly change significantly if not as a result of the continuance of the successful challenges that have already occurred, then in response to the new requirements of Public Law 93-380.

Specifically, Public Law 93-380 requires that a state, in order to retain its eligibility to receive federal funds for the education of the handicapped, must develop a plan, to be approved by the U.S. Commissioner of Education, that will:

> (13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal. (Public Law 93-380, Title VIB, Sec. 612(d)(13A)).

It is expected that these plans will be in force as of fiscal year 1976.

## Placement in the Least Restrictive Alternative Educational Setting

Another key element of Public Law 93-380 that is closely related to due process is the requirement that handicapped children be placed for educational purposes in the least restrictive alternative setting. Specifically, the law calls for the states to adopt:

> (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Public Law 93-380, Title VIB, Sec. 612(d)(13B)).

Mainstreaming is the educational term often used to describe this programing principle. Using that term, another survey of state policies in this area was conducted by SFICEC in 1974 which revealed that 6 states have laws mandating placement according to this principle, 10 provide the authority through regulations and the remainder do not as yet have any formal policy governing this programing principle.

The relationship between due process and placement in the least restrictive alternative educational setting is extremely close. Due process establishes the procedures that require the schools to consider all program alternatives and to select that setting which is least restrictive. The basis of this entire concept is the existence of a variety of options or program settings that can be used to provide education to handicapped children depending on their individual needs. The "cascade" or ""continuum" approach to programing assumes that educational settings will range from regular classrooms to residential facilities, with a minimum of eight interim alternatives. In the past, few options existed beyond the regular program, the special class or school, or non-public-school programs such as institutions. In the absence of options, children who might be described as mildly handicapped were placed in special classes with little or no opportunity for participation in the school's regular program. Further, in many school districts this decision, like many exclusion decisions, was often reached in an arbitrary and capricious manner, with little or no attention to parent involvement, data collection, consideration of alternatives, or periodic review. Gallagher (1972), for example, reported that "in a number of large city school systems far less than ten percent of the children placed in special education classes are ever returned to regular education" (p. 527).

Clearly, the assignment of a label and/or placement in a special program are actions with potentially grave consequences which may affect the entire life of a child. Some legal theorists have indicated that a decision to place a handicapped child in any setting other than that used for his nonhandicapped peers is inherently restrictive and consequently a deprivation of individual liberty, a circumstance which demands due process of law.

Implementation of due process in this regard means that school officials must be prepared to accept the burden of proof for their recommendation. Regarding the least restrictive alternative principle, the burden of proof must relate to the concept well expressed in the Massachusetts statute that "until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education" (Massachusetts Law, Chapter 71B, 1972),

## Implications for Public Education Agencies

There is no mystery to why parents, advocates, and others have resorted to demanding that public school officials provide due process safeguards to handicapped children and their families when making educational decisions. As has been indicated, the abuses are legion and the actions have often been characterized by arbitrary and capricious behavior. In many instances, parents have literally been denied the chance of effectively participating in decisions having significant implications for the total life of their children. In commenting on the opportunity for hearings and due process achieved by the PARC litigation, Thomas Gilhool, attorney for the Pennsylvania Association for Retarded Children, said:

> A mechanism is created to assure that the educational program fits the child. The mere fact of a hearing opportunity on change in assignment and every two years thereafter will of course keep all the field professionals on their toes. There is a new instrument for accountability -- to the child, to the parent, to the Secretary of Education, and to the teacher as professional. (Lippman & Goldberg, 1973, p. 58).

It is important for public educators to understand that implementing due process may produce many positive benefits. The availability of due process procedures, particularly hearings, provides the parent with the opportunity for holding the professional accountable, a desire of many professionals. In this context, the procedures of due process that require parent-school communication create the opportunity for school personnel to be open and honest with the ultimate consumers of their services. These requirements will also enable educators to adopt an additional procedure that has long been a goal -- the provision of individually designed education programs. That objective, too, has been set forth in laws and other expressions of public policy. An example is the Mills requirement that "the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child." Requiring that individual plans be developed will lead to further specific determinations as to needed resources including personnel, space, and dollars required for educating each child. Such data can be presented to appropriations bodies such as the local board of education or state legislature.

In addition, individual plans provide the basis for intelligent assessment of a child's progress in relation to the objectives initially established. This concept of periodic review, also a requirement of total due process protection, conforms with good educational programing as well. A 1973 review of state laws and administrative procedures relating to the placement of exceptional children (Trudeau & Nye, 1973b) revealed tremendous variability among the states in this regard. Analysis of the variance indicated that depending on the state, periodic reviews are required continuously, once a semester, routinely within 3 years of initial placement, or never.

Adherence to the provisions of due process also permits the school to adopt a totally new public relations approach to the education of handicapped children. Because the schools can no longer be secretive in the way they deal with these children and their parents, they have the opportunity to be totally honest in explaining to the community what they can and cannot do and the reasons why. One of the criticisms that has been directed at the psychiatric community by Chief U.S.District Court Judge David Bazelon regarding its role in courts of law has been its failure to be honest. Bazelon demands of individuals working with persons who have psychiatric problems: "Tell us you can't handle the caseload, or that you don't know or that the conditions under which you work make decent evaluations impossible." Such admissions, he reasons, will help "ventilate" the problem, and perhaps, make the issue a ripe candidate for reform (Pekkanen, 1974, p. 27).

Due process also provides an opportunity for public educators to effectively meet the educational needs of children even when there is parental resistance. From time to time, all school agencies face situations in which children who are in desperate need of assistance are prevented from receiving aid due to parental wishes. Procedures can be established by which the process, including hearings, can operate to provide the schools with the opportunity to evaluate and, when necessary, to place the children in special programs.

Finally, educators must be aware that adherence to due process procedures will in no way reduce their professional responsibility or authority. It can provide them with the leverage to do that which must be their goal -- to act openly and in the best interests of the children they serve.

## Due Process of Law

## Procedures, Sequences, and Forms

> The late Supreme Court Justice Felix Frankfurter, discussing the constitutional dimensions of due process, described the nature of the concept: "Fairness of procedure is 'due process in the primary sense'. . . . 'Due process' cannot be imprisoned within the treacherous limits of any formula. . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment." (Joint Anti-Facist Committee v. McGrath).

Providing a child with an appropriate education is of equal interest and importance to the child, the family and the schools. To insure that education, it is imperative that, when initial educational evaluation and placement decisions or changes in existing placement are being considered, due process protections must be provided to the child, the family, and the schools. All of these parties will benefit from adherence to well developed educational practices and the elements of due process. When appropriate decisions about a child's education are made in a forthright manner, these parties will be in harmony and the challenges inherent in due process need not be involved. Under other less positive circumstances, however, conflict will emerge and require resolution. Hearings conducted by impartial officers serving as designees of the chief state school officer will be convened, not to place blame or determine right or wrong, but to achieve resolution of the conflict and define an appropriate education program for the child. While the procedures presented here may appear complex and perhaps circuitous, it must be emphasized that none of the alternative routes to challenge need be used if all parties agree on the educational needs of the child and the appropriateness of the program proposed by the schools.

The right to due process is entrenched in the Fifth and Fourteenth Amendments of the U.S. Constitution. The Fourteenth Amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." This constitutional responsibility was affirmed by the U.S. Congress in 1974 when all states were required to include due process procedures in their state plan for the education of handicapped children in order to remain eligible to participate in federally sponsored programs for these children (Public Law 93-380, 1974).

Most states have in force administrative appeals procedures that apply generally to all types of administrative decision making, including education.

Typically, a parent who raises an education issue with a local administrator must carry his position to the superintendent, the local board, the chief state school officer responsible for education, the state board of education, and finally, if necessary, to the courts. Unfortunately, years can and frequently do go by before the issue is resolved. Such a time lapse violates an individual's right to speedy proceedings. In addition, such routes often violate the complaining party's right to fair proceedings. There may be no opportunity to present additional evidence or challenge existing evidence. Serious question can also be raised as to the "fairness" of the same agency officers sitting in review.

In the following pages procedures are proposed that limit the total time spent by all parties engaged in administrative due process regarding identification, evaluation, and placement decisions about handicapped children. The proposed procedures are precise and systematically tied together. The proposed process builds on the establishment of a single hearing before a hearing officer whose actions and decisions represent those of the state education agency and are directly appealable to an appropriate court. It is recognized that this procedure may not be compatible with existing law regarding due process and/or administrative appeals in all states. However, it does provide the potential for fair and speedy resolution of the issues. Further, these procedures are intended to encourage state and local education agencies to examine and possibly refine their particular due process procedures, including changing the law where necessary. It is important to keep sight of the basic intent of the proposed administrative procedures -- to provide parents* and school districts with viable means to achieve the most equitable resolution of conflicts.

## Due Process Minimums

A review of judicial orders, existing state and federal legislation, and the work of legal analysts suggests that the following procedures must be provided in order to meet minimum due process standards in identification, evaluation, and educational placement of handicapped children.

1. Written notification before evaluation. In addition, parents always have the right to an interpreter/translator if their primary language is not English. (See Form 1, Request for Interpreter/Translator, in the Appendix.)

2. Written notification before change in educational placement.

3. Periodic review of educational placement.

4. Opportunity for an impartial hearing including the right to:

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*The term parent shall be used to mean the child's parent, legal guardian, or surrogate parent, or the child himself when over the age of majority.

Receive timely and specific notice of such hearing.

Review all records.

Obtain an independent evaluation.

Be represented by counsel.

Cross examine.

Bring witnesses.

Present evidence.

Receive a complete and accurate record of proceedings.

Appeal the decision.

5. Assignment of a surrogate parent for children when:

The child's parent or guardian is not known.

The child's parents are unavailable.

The child is a ward of the state.

6. Access to educational records.

In order to execute these minimums the state, in adopting its procedures, must provide for:

- Enforcement of the requirements.
- Training of state and local education agency personnel.
- Identification, training, and monitoring of hearing officers.
- Recruitment, training, and monitoring of surrogate parents.

The state in providing appropriate due process procedures should build, to the greatest degree possible, on a combination of formal procedures and informal negotiation. Appropriate formal administrative due process procedures will greatly reduce the need for and frequency of judicial review, and sound informal discussions will reduce the need for hearings. Frequently, unresolved issues that lead to hearings are discovered to be issues because of ineffective communication between the parent and schools. Often a casual afterschool parent-school conference or other informal conversation will avoid the necessity for a hearing.

Educational administrators, teachers, and parents should work together to achieve the following conditions that enhance informal review:

- Parent involvement in all decisions that affect the educational programming of their child.

- Parent and professional awareness of their rights and responsibilities and those of the child.

- Access by parents to all levels of the educational hierarchy and system.

- Carefully developed administrative procedures that are written, codified, and made known to all involved in the process.

## Suggested Due Process Procedures

It is the responsibility of both state and local education agencies to provide appropriate administrative due process procedures that include at least the minimums described earlier. Additional procedures are presented here that incorporate the minimums within a total process that guarantees full protection of the law to children, their parents, and the public schools. In presenting these suggested procedures, it is recognized that there may be state and local education agency policies that bar adoption of some elements of the suggested procedures in their present form. Changes may have to be made in the procedures and/or state and local policies to fulfill the due process obligation. Incorporated into these suggestions are related directives that insure both appropriate educational practices and adherence to newly emerging state and federal law.

Nothing in the suggested procedures should be construed as authorizing any delay in the provision of education or other related services to which a child is otherwise entitled. Neither should the procedures be construed as a bar to any administrative or judicial proceeding by the child, parent, or public school personnel to secure compliance or otherwise to secure the proper implementation of the laws and regulations relating to the provision of regular or special education. Forms addressing the major elements of the due process procedure can be found in the Appendix.

## Written Notification Before an Evaluation

When there is reason to believe that a preschool or school age child is in need of special education services and the child becomes a candidate for individual evaluation procedures (Form 2, Referral for Evaluation), including informal assessment or observation and formal testing, then written permission must be obtained by the local education agency from the parents before the process can begin. This shall also apply when periodic reevaluation is planned.

## Notice of Intent

Prior to the performance of an evaluation the parent shall be provided with both written and oral notices of intent to conduct an evaluation (Form 3, Notice of Intent to Conduct an Evaluation). The written notice shall be in the primary language of the home and in English and will be delivered to the parent during a conference or mailed by certified mail. Oral interpretation shall always be given in the primary language of the home. If the primary language of the home is other than English and a member of the household requests that English also be used, then a second oral interpretation shall be given in English. When necessary, arrangements shall be made to effectuate communication with hearing and visually handicapped parents.

The notice of intent should contain the following:

1. The reasons the evaluation has been requested and the name of the person(s) who initiated the process.
2. The evaluation procedures and instruments that will be used.
3. A description of the scope of the procedures and instruments that will be used.
4. A statement of the right to review the procedures and instruments to be used.
5. A statement of the right to review and obtain copies of all records related to the request for the evaluation and to give this authority to a designee of the parents as indicated in writing.
6. A description of how the findings of the evaluation are to be used, by whom, and under what circumstances.
7. A statement of the right to refuse permission for the evaluation with the understanding that the local education agency can then request a hearing to present its reasons and try to obtain approval to conduct the evaluation.
8. A statement of the right to be fully informed of the results of the evaluation.
9. A statement of the right of the parent to obtain an independent educational evaluation, either from another public agency with the fee determined on a sliding scale or privately at full cost to the parent.
10. A declaration that the child's educational status will not be changed without the parent's knowledge and written approval or completion of the due process procedures described in the right to hearing section of these procedures (p. 27).

11. Identification of the education agency employee (chairperson of the evaluation team) to whom the parent response should be sent and the deadline for response given in terms of the day, date, and time. In no case should the deadline be less than 10 school days nor more than 15 school days after receipt of the notice.

A form requesting written parent permission to conduct the evaluation should be enclosed with the notice of intent (Form 4, Parent Permission Form). This form should be written in the primary language of the home and in English. In addition to written parental permission to evaluate, the local education agency should obtain written parental acknowledgment of receipt and understanding of the notice of intent.

## Notice of the Local Education Agency's Request for Hearing

Upon receipt of written parental permission, evaluation procedures should be put into motion. However, if the parent refuses to grant permission for an evaluation or if he fails to return the permission form within 15 school days of receipt of the notice of intent, the local education agency shall have the right to request a hearing to obtain approval to conduct an evaluation. If it requests a hearing, the local education agency must provide written notice to the parent in the primary language of the home (Form 5, Notice of the Filing of a Request for a Hearing). This notice should be sent by certified mail so that a signed receipt can be obtained. It should be sent on the same day the request for a hearing is filed. The notice should include:

1. A copy of the original notice of intent to conduct an evaluation.
2. A detailed description of all of the rights regarding procedures at the due process hearing (see p. 28).
3. A list of those agencies in the community from which legal counsel may be obtained for those unable to pay.
4. A description of the procedures for appealing the decision resulting from the due process hearing (see p. 30).

In addition to written notification, the local education agency should also attempt to provide oral notice and interpretation in the primary language of the home. This shall be given by the chairperson (with an interpreter, if necessary) of the proposed evaluation team.

## Evaluation Procedures

Often the evaluation process is supervised by a special education administrator, facilitated and coordinated by the chairperson of the student's evaluation team, and carried out by a team of professionals from several disciplines -- school officials, teachers, social workers, registered nurses, physicians, psychologists, and, as appropriate, other diagnostic specialists. Frequently, evaluation teams are also referred to as interdisciplinary teams, multidisciplinary teams, core evaluation teams, or student assessment teams. The work of the team should be carried out in a manner that encourages substantial parent participation.

The following procedures apply to periodic reevaluation as well as to the initial evaluation.

1. Within 5 school days after receipt of written parental permission, or after a final decision to conduct an evaluation is forthcoming from a due process hearing, the chairperson of the evaluation team shall advise the parent of the evaluation schedule (date, time, and location). This notice shall be delivered in writing, in the primary language of the home and in English, and orally in the primary language of the home (Form 6, Evaluation Schedule and Procedures).

2. Within 30 school days after notifying the parent of the schedule, the evaluation will be completed unless another date is specified and agreed to in writing by the parent.

3. Within 15 school days after the completion of the evaluation, the parent shall be given, in writing in the primary language of the home and in English and orally in the primary language of the home, the results of the evaluation, the educational implications, and a written individualized educational plan (Form 7, Educational Plan: Development). The parent should be provided with the opportunity to be an active participant in the development of the educational plan.

4. The chairperson of the evaluation team will assure the parent that no change in the child's educational status will occur without the knowledge and written approval of the parent and that due process procedures (described on p. 28) will be followed.

5. The chairperson of the evaluation team will indicate in writing that reevaluation will be required no later than 8 calendar months after the initial evaluation and then at least every calendar year so long as the child continues to receive special services; but that upon parent request, a review may be conducted at any reasonable time after the first 3 months of the placement.

## Written Notification Before Change in Education Placement

Within 15 school days after completion of the evaluation and development of the written individualized educational plan (Form 7, Educational Plan: Development), the chairperson of the evaluation team or periodic review team shall inform the parent in writing by certified mail or personally in a conference held in the primary language of the home and in English that a change in the educational status of the child is proposed or that a requested change in placement is denied. A form requesting parental approval of the proposed educational plan and placement should be included (Form 8, Educational Plan: Request for Parent's Approval).

Information included in this written notice should:

1. Describe in detail the proposed individualized educational plan, the method by which it was developed, the reasons why the proposed placement is deemed appropriate for the education of the child, and the reasons why it is the least restrictive program setting appropriate for the education of the child.

2. Specify any tests, reports, or evaluation procedures on which the proposed educational placement is based.

3. State that the school reports, files, and records pertaining to the child shall be available to the parents, or their designee as indicated in writing, for inspection and copying at the actual cost of such copying.

4. Describe in detail the right to obtain a hearing if there are objections to the proposed action or nonaction, including a description of all of the rights regarding procedures at such a hearing. This notice should emphasize that the parent need not accept the proposed decision to change or not change the status of the child when there is disagreement with the proposed alternative program.

5. Describe in detail the procedures the parent should use to appeal a hearing decision.

6. Explain that if the proposed action is rejected by the parent, the child will be temporarily continued in his present educational placement unless the present placement endangers the health or safety of the child or other children and/or substantially disrupts the educational programs of other children. In this instance the local education agency shall notify the parent of the interim change in writing, by certified mail in the primary language of the home and in English, and orally in the primary language of the home. This notice should specify:

    a. The manner in which the health and safety of the child or other children is endangered or the manner in which the educational program of other children is being disrupted.

b. The nature, duration, and location of the interim placement, which must not exceed 15 school days.

c. That the interim placement may be extended beyond 15 school days only upon the decision of a hearing officer and that in no case may it extend beyond the duration of the entire due process procedures.

d. The name of the person responsible for the interim placement and the date the interim placement will begin.

7. State that no parent of a child placed in a special program will be required to perform duties not required of any other parent whose child is enrolled in the public schools.

## Periodic Review of Educational Placement

No later than 8 calendar months after a child's educational status has been changed and during each calendar year thereafter, so long as the child continues to receive special services, the local education agency should conduct a review of the child's program to evaluate its effectiveness in meeting the educational needs of the child. At least 5 days prior to each review, the parent should be notified in writing, in the primary language of the home and in English, and orally in the primary language of the home, that the review is scheduled. The notice should also indicate the following information:

1. The date, time, and place of the review.
2. An invitation to the parents to participate in the review.
3. A description of the procedures to be used in the review.
4. A statement that the parents will receive the findings and recommendations of the review team within 10 days after completion of the review .
5. A reiteration of the procedures and rights first encountered at the initial evaluation (Form 9, Review of Educational Placement).

## The Right to an Impartial Hearing

A major element of due process is that, at some point, an opportunity is provided for the creation of a forum -- a hearing that will provide an objective review of the parent-school disagreement and utlimately produce an objective decision resolving the dispute. Regardless of the formal and informal steps leading to a hearing and the many procedural and process provisions that must be met in the hearing situation itself, the key concept is that the final decision of the hearing officer will be as impartial as possible. In this text, the term hearing officer refers to the individual who when acting in that role is an official representative of the state commissioner of education. Hearings may be convened when:

1. The child is being considered for evaluation and permission is not granted by the parents.

2. A change in the child's educational placement is planned by the state or local education agency or has been requested by the parent and there is disagreement over the recommendation.

3. A request for an extension of a temporary placement has been filed.

## Prerequisites to the Hearing

Within 5 days of the request for a hearing, the local education agency will schedule a conference with the parent to review the proceedings, findings, and recommendations to date for the purpose of settling the controversy and if possible avoiding the hearing. If resolution is not achieved at the conference or if there is insufficient communication to convene the conference, the hearing will be scheduled. Prior to the hearing the following steps should occur:

1. Prior notice of the intent to convene a hearing should be provided to the parents (Form 5, Notice of the Filing of a Request for a Hearing).

2. The parent or his designee as established in writing shall be allowed access to school reports, files, and records pertaining to the child and shall be allowed to obtain copies at the actual cost of copying.

3. Within 10 school days of receipt of a request for a hearing, a trained impartial hearing officer shall be appointed by the state education agency to preside at the hearing.

4. Within 5 school days of the appointment of the hearing officer and at least 20 days prior to the hearing, the state education agency shall provide notice of the time and place of the hearing to the hearing officer, to the parent, and to the officials of the local education agency. The hearing shall be held at a time and place reasonably convenient to the parent, but shall not occur more than 30 school days after the appointment of the hearing officer. Notice to the parties involved shall be in writing in the primary language of the home and in English and shall be sent via certified mail.

5. A parent should be informed of the right to require the attendance at the hearing of any officer, employee, or agent of the local or state education agency who may have evidence or testimony relevant to the needs, abilities, proposed programs, or status of the child.

6. The child shall remain in his current educational placement until the hearing officer enters a decision following the hearing, except in an emergency situation when the health and safety of the child or other children would be endangered or when the child's presence substantially disrupts the educational programs for other children as previously described (p. 26).

## Procedures at the Hearing

The following are guidelines for conducting the hearing:

1. The hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner so that all parties involved in the hearing shall have an opportunity and be encouraged to present their evidence and testimony.

2. The parent and the local education agency may bring representatives including legal counsel, agency representatives, or others to the hearing. Each shall have the right to a full and complete listing of persons the other party will have at the hearing.

3. The hearing shall be open to the public unless the parent requests a closed hearing.

4. The parent and the local education agency, or their respective representatives, shall have the right to present evidence and testimony.

5. The parent and the local education agency, or their respective representatives, shall have the opportunity to confront and question all witnesses at the hearing.

6. If the child is over the age of majority he or she shall have all rights of the parent, including the right to exclude the parent(s).

7. If the child has not reached the age of majority, the parents shall have the right to determine if the child shall attend the hearing, except upon a finding by the hearing officer that attendance of the child would be harmful to the child's welfare. The child may then be excluded from all or part of the hearing.

8. The burden of proof as to the adequacy and appropriateness of the proposed course of action shall be upon the local education agency. In the case of a placement question, the local education agency must demonstrate why less restrictive placement alternatives could not adequately and appropriately serve the child's educational needs.

9. A tape recording or other verbatim record of the hearing should be made. Such record shall remain under the control of the state education agency. The parent and the local education agency shall have the right to this record on request.

10. At all stages of the hearing, interpretation for the deaf and interpreters in the primary language of the home shall be provided, when necessary, at public expense.

## Decision of the Hearing Officer

Within 10 school days after the hearing is held, the hearing officer shall issue a decision in accord with the following:

1. The decision shall be in writing in the primary language of the home and in English and shall be sent by certified mail to the parent, the local education agency, and the state education agency.

2. The decision of the hearing officer shall be based solely on evidence and testimony presented at the hearing.

3. The written decision shall include findings of fact, conclusions, and reasons for them. If the decision is to disapprove a proposed educational plan, it shall state what would be an adequate and appropriate educational plan for the child. If the decision is to approve a proposed educational plan, it shall indicate why less restrictive placement alternatives could not adequately and appropriately serve the child's educational needs.

4. The decision shall include a statement of the procedures necessary to obtain an appeal of the hearing officer's decision, including a list of those agencies from which the parent may obtain legal assistance.

5. The decision shall be binding on the parent and on the local education agency, officers, employees, and agents. If the case is appealed, the decision of the hearing officer shall be adhered to pending outcome of the appeal, unless specific waiver is obtained.

## Record of the Hearing

A summary of the proceedings at the hearing shall be made. Included will be any material or statements specifically requested by any of the parties to appear in the record. The summary shall be made available to the parties to the hearing. On request of the parent or the local education agency, a copy of the tape recording or other verbatim record of the hearing shall be transcribed and provided.

## Hearing Decision Appeal Procedures

Within 10 days after a decision has been made. an appeal of the decision may be initiated by the parent or by the local education agency to the appropriate administrative official (e.g., the state superintendent of schools or court, as indicated by the state administrative procedures act).

# APPENDIX A

## Bibliography on Due Process

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# APPENDIX B

## Bibliography for Parents

# PREFACE

Parents of handicapped children continue to seek information on the problems they and their children face. In answer to this need, the Special Education Resource Center Library has assembled a bibliography consisting of books and periodicals we own.

We hope that this bibliography can be of service to you and we welcome your use of the Center. Membership is free and open to all parents.

BOOKS AND PERIODICALS LISTED HERE DO NOT IN ANY WAY REPRESENT ENDORSEMENT BY THE SPECIAL EDUCATION RESOURCE CENTER.

Compiled by
Eleanor Russell
July, 1977

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Exceptional Parent. Psy-Ed Corporation, Room 708, Statler Building, 20 Providence Street, Boston, Massachusettes 02116.

The Gifted Child Quarterly. National Association for Gifted Children, 217 Gregory Drive, Hot Springs, Arkansas 71901.

Journal of Learning Disabilities. Professional Press, Inc., 101 East Ontario Street, Chicago, Illinois 60611.

Mental Retardation. American Association on Mental Deficiency, 5201 Connecticut Avenue, N.W., Washington, DC 20015.

Volta Review. Alexander Graham Bell Association for the Deaf, 3417 Volta Place, N.W., Washington, DC 20007.

# APPENDIX C

## Agencies Involved with Due Process

This information was taken from CORRC Network Update #7 - 8/31/71.

The following is a list of agencies involved not only with due process but also with all legal matters relating to handicapped citizens. Information about any one of these agencies can be obtained by contacting the agency directly.

1. National Center for Law and the Handicapped, Inc.
   1235 North Eddy Street
   South Bend, Indiana 46617
   (219) 288-4751
   Newsletter: Newsline

2. State-Federal Information Clearinghouse for Exceptional Children
   1920 Association Drive
   Reston, Virginia
   (703) 620-3660 or 3404

3. Mental Retardation and the Law
   U.S. Department of HEW
   Office of the Assistant Secretary for Human Development
   President's Committee on Mental Retardation
   Washington, D.C. 20201
   (202) 245-7634

4. Mr. Reed Martin
   Project on Law and Behavior
   2437-A University Blvd.
   Houston, Texas 77005
   (713) 529-7691
   Newsletter: Law and Behavior

5. Children's Defense Fund
   1520 New Hampshire Ave., N.W.
   Washington, D.C. 20036
   (202) 483-1470

6. American Bar Association
   Commission on the Mentally Disabled
   1800 M Street, N.W.
   Washington, D.C. 20036
   (202) 331-2240
   Newsletter: Mental Disability Law Reporter
   The Reporter will be a continually updated compendium of legal materials for lawyers, administrators, professionals and advocates in the area of mental disabilities and a total practice tool for lawyers involved in mental disability litigation.

The 40-50 page Reporter can be ordered from the above address. The subscription price is $35; $25 for Legal Services Projects.

7. Maryland State Bar Association
905 Keeper Building
Redwood and Calvert Streets
Baltimore, Maryland 21202
(301) 685-7878
Publication: Guide to Educational Hearing Procedures for Handicapped Children.

This booklet is a compilation of the state's procedures and requirements connected with placement hearings for handicapped students.